DOCKET

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No. 87-1939-CFX
Status: GRANTED

Title: Geoffrey W. Barnard, etc., Petitioner
v.
Susan Esposito Thorstenn, et al.

Docketed:
May 26, 1988

Court: United States Court of Appeals
for the Third Circuit

Vide:
87-2008

Counsel for petitioner: Hodge,Maria Tankenson

Counsel for respondent: Hitchcock,Cornish

Entry	Date	Note	Proceedings and Orders
1	May 26 1988	G	Petition for writ of certiorari filed.
2	Jun 7 1988		Brief of respondents Susan Esposito, et al. in opposition filed.
3	Jun 14 1988		DISTRIBUTED. June 29, 1988
4	Jun 30 1988		Petition GRANTED.
			**********
5	Aug 15 1988		Brief amicus curiae of Virgin Islands filed.
6	Aug 15 1988		Joint appendix filed. VIDED.
7	Aug 15 1988		Brief of petitioners Geoffrey Barnard, et al. filed. VIDED.
8	Aug 29 1988		Record filed.
		*	Certified original record received. (Vide 87-2008).
11	Sep 6 1988		Order extending time to file brief of respondent on the merits until September 30, 1988.
9	Sep 7 1988		Record filed.
		*	Certified copy of briefs, appendix and partial proceedings received. (Vide: 87-2008).
12	Sep 30 1988		Brief of respondents Susan Esposito, et al. filed. VIDED.
13	Sep 30 1988	G	Motion of Paul Hoffman, et al. for leave to file a brief as amici curiae filed.
14	Oct 24 1988		SET FOR ARGUMENT. Wednesday, January 11, 1989. This case is consolidated with 87-2008. (3rd case) (1 hr.)
15	Oct 24 1988		CIRCULATED.
17	Oct 28 1988	G	Application (A88-345) to extend the time to file a reply brief from October 30, 1988 to November 14, 1988, submitted to Justice Brennan.
16	Oct 31 1988		Motion of Paul Hoffman, et al. for leave to file a brief as amici curiae GRANTED.
18	Oct 31 1988		Application (A88-345) granted by Justice Brennan extending the time to file until November 14, 1988.
19	Nov 12 1988	X	Reply brief of petitioner Geoffrey Barnard, etc. filed. VIDED.
20	Jan 11 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87 - 1989

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GEOFFREY W. BARNARD, AS CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS,

Petitioner,

v.

SUSAN ESPOSITO (THORSTENN) AND LLOYD DE VOS,

Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

The United States Virgin Islands is a group of three Caribbean islands located approximately 1500 miles from the continental United States. It is an unincorporated territory in which a federally established court, the District Court of the Virgin Islands, is both the federal trial court and the court of appeals for the Territorial Courts. The district court's rules provide that one must be a resident of the territory in order to be admitted to the bar. The United States Court of Appeals for the Third Circuit, sitting en banc, held that this court's ruling in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987), was binding precedent requiring the exercise of the Circuit's supervisory power to invalidate the Virgin Islands residency rule.

The Question Presented for review by this Court is:

Whether the decision in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987), prohibits a federal court in the unincorporated territory of the United States Virgin Islands from requiring residence as a requisite for the practice of law.

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OPINIONS BELOW

The District Court of the Virgin Islands held that several substantial reasons exist to justify the residency requirement. Moreover, the discrimination practiced against non-residents was held to be the least restrictive means of preventing the harm which would be caused by the admission of non-resident attorneys to the bar.

On appeal to the United States Court of Appeals for the Third Circuit, the Circuit found *Frazier v. Heebe* required the

Circuit to exercise its supervisory powers over the District Court of the Virgin Islands and the Circuit reversed the District Court's decision.

Following a Rehearing in Banc before the Third Circuit, the judgment of the District Court was reversed.

JURISDICTION

The opinion of the court of appeals following the Rehearing in Banc was filed on March 31, 1988. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the following:

Revised Organic Act of the Virgin Islands of 1954, §§ 21 through 25, and 27 codified at 48 U.S.C. §§ 1611-1615, 1617 (1982), and Rules of the District Court of the Virgin Islands, V.I. Code Ann. tit. 5 App., Rule 16(B) and Rule 56(b) 4 and 5. All of these provisions are set forth in the Appendix.

STATEMENT OF THE CASE

Respondents Susan Esposito Thorstenn and Lloyd DeVos are attorneys at law having been admitted to practice before certain state and federal courts.[1] Thorstenn and DeVos are residents of New York and New Jersey, respectively, and both maintain offices for the practice of law in New York. Both applicants have sat and passed the Virgin Islands bar exam, however, neither respondent intends to take up residence in the Virgin Islands.

Respondents sought a declaratory judgment in the District Court of the Virgin Islands arguing that the residency requirement of the District Court of the Virgin Islands was unconstitu-

1 For convenient reference Respondents Thorstenn and DeVos are sometimes referred to herein as "the applicants".

tional, citing the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution as interpreted in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

The District Court of the Virgin Islands held that there were substantial reasons justifying the residency requirement in the special circumstances of the territory.

The applicants then appealed to the United States Court of Appeals for the Third Circuit, where the Circuit considered not only *Piper* and the Privileges and Immunities Clause, but also considered the supervisory powers as used in *Frazier v. Heebe*. A three judge panel of the Court of Appeals, in a split decision relying on *Frazier* concluded it was bound to exercise its supervisory powers over the District Court of the Virgin Islands to strike the rule, and reversed the District Court decision. The matter was then reheard in banc, where a majority determined that *Frazier* was binding precedent even as to the Virgin Islands, and issued an opinion reversing the District Court of the Virgin Islands.

REASONS FOR GRANTING THE PETITION

The Virgin Islands Committee of Bar Examiners petitions this Court to issue a writ of certiorari and to reverse the decision of the Court of Appeals.

I.

THE DISTRICT COURT OF THE U.S. VIRGIN ISLANDS IS SO GEOGRAPHICALLY DISTINCT FROM FEDERAL COURTS OF THE MAINLAND UNITED STATES THAT APPLICATION OF THE SUPERVISORY POWER TO STRIKE ITS RESIDENCY RULE IS IMPROPER.

The decision below, rendered by a deeply divided Circuit[2] incorrectly treats this Court's opinion in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987), as requiring that all federal courts, wherever located, whatever the peculiarities of their jurisdiction, and whatever their special circumstances, adhere to a single worldwide rule that residence may not be required for admission to the practice of law.

As this Court explained the exercise of the supervisory power to strike the Louisiana federal court residence rule in *Frazier*, the proffered reasons for the rule there had been found unnecessary and irrational. The Court did not say that no federal court may have such a rule, no matter the reasons. Yet the omission of express recognition, in the text of the *Frazier* opinion, of the possibility of some federal courts retaining or adopting residency rules has led the Third Circuit to conclude it may not permit any lower court under its supervision to retain such a requirement.

The Court of Appeals' excessively broad reading of *Frazier* treats the geographically remote unincorporated territories as if they were indistinguishable from the contiguous states. It also ignores the unique and politically necessary jurisdictional hybrid which the federal district courts in the territories are, as if

2 Eight members of the court joined the majority opinion. Five members dissented. (App. 3a, 10a)

their jurisdiction and governing law were like the federal courts of Louisiana, an integrated part of the standardized system of judicial units applying a uniform "specialized federal law," requiring a "mobile" and "specialized" federal bar.

But the federal courts of the Caribbean and Pacific territories have been crafted by Congress under its Article I powers to function only in part as federal trial courts but also in other ways.[3] They do not offer to litigants the same range of Constitutional guarantees as do the federal courts elsewhere, and this discrimination has long been upheld. *Rivera v. Government of the Virgin Islands*, 375 F.2d 988 (3d Cir. 1967) holding the right to presentment by grand jury is not guaranteed in the unincorporated territories; *U.S. v. Canel*, 708 F.2d 895 (3d Cir. 1983) holding the right to trial in federal court before a judge granted life tenure does not apply to the unincorporated territories. In sum, the federal courts in the territories have a judicially sanctioned tradition of distinction from the federal norms, and this tradition had been endorsed by the Third Circuit until *Frazier*.

Prior to the *Frazier* opinion, the Third Circuit had long held the Virgin Islands' geographic isolation and other special circumstances led to a series of consequences for the courts and the bar which constituted substantial reasons to exclude nonresidents from the practice of law in the islands. *Aronson v. Ambrose*, 479 F.2d 75 (3d Cir. 1973). The court had stated that ". . . as a practical matter the Virgin Islands may be reached from the mainland only by travel on limited and, frequently, congested airlines. The case load of the district court is continually increasing and it would be intolerable if the court were

3 For example, the District Court of the Virgin Islands is the court of appeals for the territorial courts. Revised Organic Act of the Virgin Islands of 1954 § 23A, 48 U.S.C. § 1613(a) (1982). It has concurrent jurisdiction in civil matters where as little as $500 is at issue. Revised Organic Act of the Virgin Islands of 1954 § 22, 48 U.S.C. § 1612 (1982). It has concurrent jurisdiction, too, in all criminal matters in which the maximum penalty cannot exceed a fine of $100 and imprisonment for six months, whether the offense is federal or territorial, Revised Organic Act of the Virgin Islands of 1954 § 22, 48 U.S.C. § 1612(b) (1982).

compelled to depend, even in part, on lawyers living and practicing on the mainland more than a thousand miles away to answer urgent motion calls, attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants." 479 F.2d at 78.

In the decision below the Third Circuit did not reverse *Aronson*. Indeed, the majority opinion did not conclude that the Virgin Islands residency requirement was no longer founded on the same substantial reasons which the Court had previously recognized. Rather, it concluded that *Frazier* mandated the exercise of its supervisory power to void the residency rule (App. 8a), apparently without regard to whether that rule, in the context of a remote territory, is justified by substantial reasons.

But this Court's opinion in *Frazier* did not mandate such a result. *Frazier* examined a district court rule in Louisiana that excluded from practice in the Louisiana federal courts' members of the state bar, already admitted and practicing in the local courts, simply because they resided across the state line in Mississippi. The test there applied, which the Louisiana rule failed, was not a *per se* rule against residency requirements. Instead, it was a test of necessity and rationality, *Frazier*, 107 S. Ct. at 2612. The Court concluded that in the circumstances there presented, the residency rule lacked both.

For one of the circuit courts now to engorge the *Frazier* holding into a system-wide absolute prohibition on residency requirements would be, in the words of the dissenting members of the Third Circuit, to deny the unincorporated territories the "flexibility to cope with the peculiar circumstances of their districts." (App. 22a) While the immediate object of the decision below is one territory, the potential impact of the Circuit's overly-broad interpretation of *Frazier* has disturbing implications for other territories and other federal courts as well.

The particular circumstances affecting the practice of law in the Virgin Islands all begin with the geographical isolation of the small island group: lack of reliable, readily available transportation to and from the mainland, difficulty in document

transmittal, and telecommunications deficiencies, rendering alternative means of legal intercourse undependable.[4]

Furthermore, there were at the time of the decision below only two federal judges in the Virgin Islands.[5] Statistics gathered by the Administrative Office of the United States Courts for the year 1983 (the most recent available) indicate there were, on average, 481 pending cases per judgeship in the district courts, whereas in the Virgin Islands there were 781 pending cases per judgeship. (App. 65a) The territory, thus, has a massively disproportionate case load per judge to manage and conclude on a timely basis. Faced with this imposing judicial burden, the district court judge concluded the residency rule was indispensable to any semblance of efficient judicial administration, given the extreme difficulties associated with travel and communication between the islands and the mainland.

Added to these onerous circumstances is the problem of a large proportion of indigent persons in the island population,

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4 Affidavits filed with the district court by Examiners of the Virgin Islands bar stated, *inter alia*, that (1) "particularly during what is locally referred to as 'the tourist season' between December and April, reservations may be totally unavailable for commercial flights," (Affidavit of Geoffrey Barnard, Chairman of Committee of Bar Examiners); (2) '[i]t is often difficult to secure a long distance [telephone] connection to a distant point, or to maintain a fully audible conversation without interference from static, voice fade outs, transmission gaps, or disconnections", and (3) "[m]ail delivery is often unreliable and almost always involves material delay." Similarily, the President of the Virgin Islands Bar Association stated that, "while telecomunications between the Virgin Islands and the continental United States have improved substantially in the last decade, they remain erratic and conversations are frequently impaired by static, echoes, transmission gaps and disconnections." (Affidavit of Patricia D. Steele). The Committee of Bar Examiners' affidavit also stated that "[t]he resources of the small Virgin Islands bar could never accommodate a serious and adequate investigation into the professional competence . . . or the ethical standards of non-resident lawyers." (Affidavit of Geoffrey Barnard, The Chairman of the Committee of Bar Examiners).

5 There is presently only one, the second having recently taken senior status without, as yet, any replacement.

leading in turn to a high level of indigency among criminal defendants. With a small federal public defender's office, the Virgin Islands district court has, by rule, long required all members of the bar to share the duty to represent indigent criminal defendants at a nominal fee. V.I. Code Ann. tit. 5 App. V Rule 16(B) (1986).

Appointed counsel is naturally required to communicate with his client promptly.[6] Proper representation, of course, requires far more than this initial consultation. Providing representation to all criminal defendants is obviously an important public purpose, and the local rule is the only feasible way to fulfill this need given the very limited financial resources available to the federal and territorial courts. Failure of the Virgin Islands judicial system to hear and conclude all criminal cases within the time prescribed by law, due to delays caused by non-resident defense counsel's inability to appear, could result in dismissal of charges. Speedy Trial Act 28 U.S.C. § 3161 et seq. The possible effects of such a judicial collapse upon an island community already struggling with one of the highest per capita crime rates in the nation, is a substantial reason for the rule.

Additionally, all Virgin Islands lawyers are required to share the duty to provide representation to abused children, juvenile delinquents, and certain other categories of persons in the territory's family court, on a rotating basis. Consequently, the residency requirement in this territory is deeply and inextricably entwined with the islands' efforts to meet their obligations to those whom the Constitution and moral duty demand receive fair legal representation.

Moreover, the financial limitations of such a small jurisdiction lead to an inability to manage judicial administration in a fashion meeting stateside expectations. For example, as the district court noted, publication of local opinions is delayed, often for years, except in the form of slip opinions in the court's offices. Thus, non-resident lawyers as a practical matter would find it virtually impossible to remain current on developments

6 Rule 16 requires this be done within 5 days, "at the place of incarceration."

in local law. Inadequately researched briefs and unprepared counsel are a clearly foreseeable harm if residence is to be a forbidden requirement for practice in the islands.

II.

THE DISTRICT COURT OF THE VIRGIN ISLANDS IS LEGALLY AND CONSTITUTIONALLY DISTINCT FROM OTHER LOWER FEDERAL COURTS, AND INVALIDATING ITS RULES OF PRACTICE UNDER THE SUPERVISORY POWER IS IMPROPER.

In the case of the unincorporated territories, the Constitution expressly gives to the Congress the power to "make all needful Rules and Regulations", U.S. Const. Art. IV Sec. 3, cl. 2. Under this power, Congress had, until 1984, given to the District Court of the Virgin Islands the authority to prescribe the rules of "practice and procedure of the inferior courts" of the territory as well as "the duties of the judges and officers" thereof, together with a substantial additional series of judicial matters. Revised Organic Act of the Virgin Islands of 1954 § 23, 48 U.S.C. § 1613 (1982). The district court was, by the same act, directed to apply the Federal Rules of Civil Procedure, including those rules governing admiralty and bankruptcy. This special statutory grant implied the intent of Congress to confer on the federal court in the territory the responsibility and the right to develop rules of practice particularly suited to the needs and circumstances of that jurisdiction. Revised Organic Act of the Virgin Islands of 1954 § 23, 48 U.S.C. § 1613 (1982). In 1984, the law was amended by Congress to grant the power to prescribe rules of practice in the territorial courts to those courts or the local legislature. Revised Organic Act of the Virgin Islands of 1954 § 21, 48 U.S.C. § 1611 (1982). This allocation and reallocation of authority to prescribe the rules of practice in the territory's courts clearly constitutes a congressional determination to permit locally determined rules suited to the territory's special needs. In the face of this constitutional and statutory history, to hold that the Virgin islands must be swept into a

uniform national rule of admission to practice is to disregard the congressional allocation of authority.

III.

THE UNINCORPORATED TERRITORIES SHOULD BE ALLOWED THE FLEXIBILITY TO DEVELOP THEIR OWN RULES OF PRACTICE, ADAPTED TO THEIR CULTURAL ENVIRONMENT, UNLESS THOSE RULES ARE UNNECESSARY AND IRRATIONAL.

Particularly in the unincorporated territories, under the political umbrella of U.S. citizenship but not destined for statehood, linguistic, historical and other cultural distinctions render them profoundly unique in the American experience. This cultural and historical disparity has led this Court in the past to recognize the importance of treating the territories with special deference. For example, in the case of the Commonwealth of Puerto Rico (no longer an unincorporated territory, but having a similar legal and historical relationship) this Court has said:

> The relations of the federal courts to Puerto Rico have often raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal courts, reversing Puerto Rican courts, were inclined to construe Puerto Rican laws in the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this Court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be "inescapably wrong." *Bonet v. Texas Co.*, 308 U.S. 463, 471 (1940).

Fornaris v. Ridge Tool Co., et al., 400 U.S. 39, at 40-41 (1970).

Like the people of Puerto Rico,[7] the people of the Virgin Islands share a non Anglo-Saxon ancestry. Their colonial past includes cultural imprints of Danish, African, French, Dutch, and Spanish origin. This results in a need for respectful acknowledgement that not every traditional American viewpoint is necessarily well suited to the needs and values of the people of the territory, and the same deference this court has found warranted in the case of Puerto Rico, should also be accorded the Virgin Islands. The residence rule, then, should not be stricken unless the adoption of that rule by the District Court of the Virgin Islands is "inescapably wrong," or, in the words of *Frazier* unnecessary and irrational.

CONCLUSION

For the foregoing reasons, Petitioner, Geoffrey W. Barnard, in his capacity as Chairman of the Board of Bar Examiners, submits that a majority of the United States Court of Appeals for the Third Circuit has given *Frazier v. Heebe* too broad an interpretation. Petitioner therefore urges this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

DATED: May 23, 1988

Respectfully Submitted,

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7 The federal district courts of Puerto Rico require as a condition of the right to practice law, that applicants pass a three day bar examination conducted entirely in Spanish. Is that rule prescribed by inference from the holding in *Frazier* or is this Court's commitment to honoring the indigenous cultures of the territories in the conduct of federal judicial supervision still in effect?

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3034
No. 87-3035

SUSAN ESPOSITO [Thorstenn]
LLOYD DE VOS

v.

GEOFFREY W. BARNARD, in his capacity as chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally

and

VIRGIN ISLANDS BAR ASSOCIATION,

Defendant-Intervenor

Susan Esposito Thorstenn
and Lloyd De Vos, Appellants

Appeal from the District Court
of the Virgin Islands--St. Thomas

D.C. Civil No. 85-0206
D.C. Civil No. 85-0207

Argued: April 28, 1987
(Opinion Filed September 30, 1987)
BEFORE: SEITZ, HIGGINBOTHAM, and ROSENN, *Circuit Judges*.

Rehearing in Banc December 16, 1987

BEFORE: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and ROSENN, *Circuit Judges*.

(Opinion Filed March 31, 1988)

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

Plaintiffs, Susan Esposito Thorstenn and Lloyd De Vos, appeal the order of the district court granting the defendants' motion for summary judgment and, in effect, denying the plaintiffs' motion for summary judgment. This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

Thorstenn and De Vos applied for admission to the bar of the Virgin Islands. Thorstenn is a resident of

New York: De Vos is a resident of New Jersey. Both are members in good standing of the New York and New Jersey bars.

Under the Rules of the District Court of the Virgin Islands, an applicant must live in the Virgin Islands for one year before applying for admission to the bar, and must state his or her intention to reside in the Virgin Islands. 5 V.I.C., App. V, Rule 56(b)(4), (5). Because Thorstenn and De Vos did not comply with these residency requirements, they were denied admission to the Virgin Islands bar.[1]

The plaintiffs filed these actions, alleging that the residency requirements of the Virgin Islands violated the privileges and immunities clause of the constitution and seeking to enjoin the enforcement of such rule.[2] Both the plaintiffs and the defendants filed motions for summary judgment with supporting affidavits. Plaintiff De Vos reported that he had not experienced trouble travelling to the Islands. In contrast, Barnard, chairman of the Committee of Bar Examiners, in his affidavit, maintained that travel service between the continental United States and the Virgin Islands was difficult and erratic. The parties also disagreed about the quality of telecommunications between the Islands and the mainland. In view of our disposition of the legal issue presented in this case, however, we do not believe that the parties'

1. The district court permitted the plaintiffs to sit for the Virgin Islands bar examination, while reserving the issue of their eligibility for admission to the bar. Both plaintiffs passed the bar examination. Thus, there is no dispute that the only reason they were denied admission is because they are nonresidents of the Virgin Islands.

2. The privileges and immunities clause of the United States Constitution has been extended to the Virgin Islands by the Revised Organic Act, 48 U.S.C. § 1561 (1982).

disagreement over the ease of travel and communications between the Virgin Islands and the continental United States creates an issue of material fact.[3]

The district court granted the defendants' motion for summary judgment on the ground that the unique conditions in the Virgin Islands justified the residency requirements, and thus the requirements did not violate the privileges and immunities clause as applied in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). In support of this conclusion, the district court relied on the geographical isolation of the Virgin Islands from the continental United States, the delay in publication of local decisions, the case load in the district court, the need to ensure that its lawyers are ethical, and the rule governing the appointment of counsel for indigent criminal defendants. These appeals followed.

While these appeals were pending, the Supreme Court of the United States handed down its decision in *Frazier v. Heebe*, 107 S. Ct. 2607 (1987). The Court, relying on its supervisory power, invalidated certain attorney residency and office requirements contained in the local rules of the United States District Court for the Eastern District of Louisiana. Because of the established policy favoring a non-constitutional disposition, if possible, we address the applicability of *Frazier v. Heebe* to this appeal.

The petitioner in *Frazier* was a Mississippi attorney. He applied for admission to the bar of the United States District Court for the Eastern District of

3. While Judge Becker believes that there may be a case in which problems with travel or communications might create an issue of material fact, he believes that no such issue is created by what he deems to be the conclusory affidavits filed by the defendants here. *Cf.* Fed. R. Civ. P. 56(e).

Louisiana. His application was rejected because he admittedly did not comply with the provisions of the local rules noted above.

The district court and the court of appeals refused to invalidate the local rules. Those courts concluded that the requirements facilitated the efficient administration of justice because nonresident attorneys allegedly are less competent and less available to the court than are resident attorneys. The Supreme Court granted certiorari. *Frazier v. Heebe*, 107 S. Ct. 454 (1986). It thereafter decided that "[p]ursuant to our supervisory authority, we hold that the district court was not empowered to adopt its local rules to require members of the Louisiana Bar who apply for admission to its bar to live in or maintain an office in Louisiana where the court sits." 107 S. Ct. at 2611. It found that the reasons given for the residency requirement were unnecessary and irrational.

First, the Court stated that no empirical evidence demonstrated why the district court was justified in discriminating against one of two classes of attorneys who were members of the Louisiana bar. The Court went on to say that there is no reason to believe that nonresident attorneys who have passed the Louisiana bar examination are less competent than resident attorneys. 107 S. Ct. at 2612-13. There is no suggestion that the situation is otherwise in the Virgin Islands.

The Court next concluded that it did not agree that the alleged need for immediate availability of attorneys in some proceedings requires a blanket rule that denies all nonresident attorneys admission to a district court bar. *Id.* at 2613. The Court pointed out that improvements in communications minimize the problem of availability, and that alternative resolutions are possible.

The Court thereupon held that the residency requirement imposed by the Eastern District was unnecessary and arbitrarily discriminated against out-of-state attorneys.

The reasons advanced here by the district court, the appellees and the amicus curiae, the Government of the Virgin Islands, in support of the validity of the local rules for the district court of the Virgin Islands are essentially the same as those rejected for lack of inherent merit in *Frazier*. Indeed, the district court found that the most compelling reason for excluding nonresidents was the need to have counsel available in criminal cases. The Supreme Court, however, concluded that alternative resolutions of this problem are the answer.

We have no doubt that alternative rules could validly be adopted that would impose reasonable requirements on non-resident members of the Virgin Islands bar to assure that they would bear professional responsibilities comparable to those now imposed on resident attorneys. In consequence, non-resident members of the bar would not have a privileged status in the practice of law in the Virgin Islands. We further note that reasonable rules could be adopted to relieve the Government of the Virgin Islands of any undue expenses resulting from the admission of non-resident attorneys.

We emphasize that the Court invoked its supervisory power in *Frazier v. Heebe*. Moreover, we are convinced that the Supreme Court of the United States did not invoke its supervisory power merely to adopt an ad hoc rule for the resolution of the problem presented. Such a view would create the possibility of litigation with respect to every federal district having a residence requirement.

We conclude that *Frazier* must be viewed as generally applicable to the United States district courts. We have no doubt, therefore, that it is binding precedent here unless the status of the District Court of the Virgin Islands dictates otherwise. The District Court of the Virgin Islands is, of course, not a United States district court. It was created by an act of Congress and exercises exclusive federal jurisdiction in that Territory under the Revised Organic Act, 48 U.S.C. § 1612 (1982).

Given the integrated status of the Virgin Islands in the federal court system, 28 U.S.C. §§ 1254, 1291 (1982), we have no doubt that the United States Supreme Court has supervisory authority over the District Court of the Virgin Islands. Under 28 U.S.C. § 2071 (1982), local rules adopted by United States courts, including those of the District Court of the Virgin Islands, must "be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." *See also* 28 U.S.C. § 2072 (1982). We thus conclude that the Supreme Court's ruling in *Frazier v. Heebe* requires that we invalidate the provisions of 5 V.I.C., App. V, Rule 56(b)(4), (5) to the extent that they require an applicant to live in the Virgin Islands for one year before applying for admission to the district court bar and to state that it is his or her intention to reside in the Virgin Islands.[4]

The appellees argue that the supervisory power should not be exercised to invalidate the residency requirements because the supervisory power is to be used only in unique circumstances, usually criminal cases. This argument, however, is unpersuasive in

4. In addition, appellants attack the validity of District Court Rule 16. *See* 5 V.I.C., App. V, Rule 16. We think this matter is better left for further consideration by the district court in light of the basic determination of this case.

light of the decision by the Supreme Court to employ its supervisory power to invalidate the residency requirement imposed by the Eastern District of Louisiana. Indeed, the dissent in *Frazier* focused on whether it was appropriate to rely on the Court's supervisory power in the case. *See* 107 S. Ct. at 2614-16 (Rehnquist, C.J., dissenting).

Moreover, we disagree with the appellees' and the amicus curiae's[5] assertions that the facts in this case dictate a different result than that reached by the Supreme Court. As indicated above, the justifications offered by the district court in this case were essentially the ones rejected in *Frazier*. Even against the remote possibility that we are not bound to apply *Frazier v. Heebe* here, we believe that in the exercise of our clearly established supervisory power over the District Court of the Virgin Islands, *Government of the Virgin Islands v. Bryan*, 818 F.2d 1069 (3d Cir. 1987), we would be compelled, by parity of reasoning to that employed in *Frazier*, to apply our supervisory power, *see LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957), to invalidate the residency requirements in the rules.[6]

Accordingly, the judgment of the district court will be reversed and the case remanded with instructions to enter summary judgment in favor of the plaintiffs.

5. Stressing the need for accessability and availability of attorneys, the amicus curiae largely reiterates the position of the appellees.

6. In view of our determination, we need not resolve the constitutional attack on the rules based on the privilege and immunities and equal protection clauses.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting, with whom WEIS, GREENBERG, HUTCHINSON and SCIRICA, *Circuit Judges*, join:

I believe that the majority's reliance on *Frazier v. Heebe*, ___ U.S. ___, 107 S. Ct. 2607 (1987), is flawed. More than two centuries ago Lord Mansfield, perhaps England's wisest jurist,[1] stressed that

> [p]recedents only serve to illustrate principles, and to give them a fixed authority. But the law . . . . exclusive of positive law enacted by statute, depends upon principles, and these principles run through all the cases according as the *particular circumstances* of each case have been found to fall within one or the other of them.

Jones v. Randall, 98 Eng. Rep. 954, 955 (1774) (emphases added). The "particular circumstances" of *Frazier* are so dissimilar from those of the instant case that to rely on *Frazier* is to exceed the limits of its logic and to adopt a mechanical jurisprudential approach.[2] Esposito and De Vos' location 1,668 miles from the Virgin Islands is so unlike Frazier's location 110 miles from New Orleans that this Virgin Islands case does not fall anywhere near the "particular circumstances" eliciting the Supreme Court's exercise of supervisory power in *Frazier*.

Two facts permeate any examination of the district court's residency requirements for admission to the Virgin Islands bar: the territory of the Virgin Islands is

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1. *See* W. Holdsworth, Some Makers of English Law 161-62 (1938); C. Fifoot, Lord Mansfield (1936); F. Birkenhead, 14 English Judges 180 (1926).

2. *See* Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 605-08, 613, 620-21 (1908); R. Aldisert, The Judicial Process 303-14 (1976).

a setting significantly different from any found in the forty-eight contiguous states, and the District Court of the Virgin Islands is distinct from any federal district court located in the continental states. In my view, these differences transform *Frazier* into merely relevant, not controlling, authority. *Frazier* permits us to exercise our discretionary supervisory power to strike down a residency requirement; on these facts, we should decline to do so.

As disturbing as the majority's eagerness to overlook the facts that distinguish this case from *Frazier*, however, is its disregard of the implicit basis for the *Frazier* holding. Although residency requirements for admission to a federal court's bar were set aside in *Frazier* through the mechanism of supervisory power, *Frazier* was heavily premised upon the Supreme Court's privileges and immunities analysis of a state's bar residency requirement in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). Thus, even assuming that our supervisory power is properly invoked on the facts presented here, such an exercise should at least be guided by the outcome of the *Piper* legal test.

I believe that the district court properly construed the privileges and immunities clause in light of *Piper*, that *Frazier* does not meaningfully alter the applicable analysis, and that there are unresolved factual issues in this case concerning the relationship of the unique circumstances of the Virgin Islands to the challenged residency requirements. For all these reasons, I respectfully dissent.

I.

In *Piper*, the Supreme Court held that the exclusion of a nonresident from admission to the New Hampshire bar ran afoul of the privileges and immunities clause of the United States Constitution,

art. IV, § 2. The Court noted, however, that the privileges and immunities clause, "'[l]ike many other constitutional provisions, . . . is not an absolute.'" *Piper*, 470 U.S. at 284 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). It "does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Id.* Applying *Piper*'s two-pronged analysis in this matter, the Virgin Islands district court concluded that the residency requirements of Rule 56, V.I.C. tit. 5, App. V (1982),[3] do not violate the privileges and immunities clause. This appeal followed.

While this appeal was pending, the Supreme Court, invoking "its inherent supervisory power to ensure that . . . local Rules [of a federal district court] are consistent with 'the principles of right and justice[]'", *Frazier*, 107 S. Ct. at 2611 (citations omitted), struck down in-state home and office requirements for admission to the bar of the United States District Court for the Eastern District of Louisiana. The Court explained that this exercise of supervisory power was intended "to prohibit arbitrary discrimination against . . . [nonresidents] otherwise qualified to join the bar." *Id.* at 2611-12. After examining the challenged requirements in light of their claimed justifications, i.e., the assertion that such requirements "facilitate the efficient

3. Rule 56, entitled "Admission to the Bar", has two residency components. The first requires "[e]ach applicant . . . [to] have resided in the Virgin Islands for at least one year immediately preceding his [or her] proposed admission to the Virgin Islands Bar." Rule 56(b)(4), V.I.C. tit. 5, App. V (1982). The second requires that each applicant, "[i]f admitted to practice . . . , intend[] to continue to reside in and to practice law in the Virgin Islands." Rule 56(b)(5), V.I.C. tit. 5, App. V (1982).

administration of justice, because nonresident attorneys allegedly are less competent and less available to the court than resident attorneys", *id.* at 2612, the Supreme Court found "both requirements to be unnecessary and irrational." *Id.*

The result in *Frazier*, while reached through nonconstitutional judicial methods, is informed by the factual and legal framework of the earlier *Piper* decision. In each case, for instance, the Court noted the relatively minor distance between the nonresident attorney-petitioner's home and the bar that he or she was not allowed to join. *Frazier*, 107 S. Ct. at 2613 ("[petitioner's home in Mississippi] is . . . only 110 miles away" from "the New Orleans courthouse of the Eastern District"); *Piper*, 470 U.S. at 275 ("Kathryn Piper lives in Lower Waterford, Vermont, about 400 yards from the New Hampshire border"). In addition, the *Frazier* Court, citing *Piper*, stated its belief that most nonresident attorneys desiring admission to the bar would reside or practice in locations "'reasonably convenient'" to the district court. 107 S. Ct. at 2613 (quoting *Piper*, 470 U.S. at 287). It also declared, relying on *Piper*, that "a nonresident lawyer is likely to have a substantial incentive, as a practical matter, to learn and keep abreast of local rules." *Id.* (citing *Piper*, 470 U.S. at 285). Finally, in assessing the necessity and rationality of the district court rule, *Frazier* employed an "alternative means" analysis, *id.*, that is similar to the "less restrictive means" analysis of *Piper*. 470 U.S. at 284. *Frazier* did note, however, at least one distinction between the two cases:

> [r]ules that discriminate against nonresident attorneys are even more difficult to justify in the context of federal court practice than they are in the area of state court practice, where laws and procedures may differ substantially from state to state . . . . The Court's

> supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system, while its authority over state court bars is limited to enforcing federal constitutional requirements.

107 S. Ct. at 2612 n.7.

This Court properly considers whether a non-constitutional basis, pursuant to *Frazier*, exists for disposition of this appeal. I cannot agree, however, with the majority's belief that "the Supreme Court's ruling in *Frazier v. Heebe* requires that we invalidate the provisions of [the Virgin Islands residency requirements]." Maj. typescript at 7. The majority asserts that *Frazier* "is binding precedent here unless the status of the District Court of the Virgin Islands dictates otherwise." *Id.* at 7-8. Nevertheless, the majority discusses only one aspect of that court's status: the fact that the District Court of the Virgin Islands derives its federal jurisdiction over the territory of the Virgin Islands from the Revised Organic Act, 48 U.S.C. § 1612 (1982). Maj. typescript at 7-8; *accord Govt. of the V.I. v. Bell*, 392 F.2d 207, 209 (3d Cir. 1968).

I do not dispute that Congress intended the Virgin Islands district court, despite its unique origin,[4] to be integrated into the federal court system. Nor do I question that this Court may exercise its supervisory

4. Although the District Court of the Virgin Islands is not a "United States District Court" created pursuant to Chapter 5 of Title 28, 28 U.S.C. §§ 81-144 (1982), it is granted all of "the jurisdiction of a District Court of the United States" by Section 22 of the Revised Organic Act, 48 U.S.C. § 1612(a) (1982). Furthermore, Title 28 specifically includes the Virgin Islands within the third judicial circuit of the United States, 28 U.S.C. § 41 (1982), and gives this Court jurisdiction to review final decisions of the Virgin Islands District Court. 28 U.S.C. §§ 1244(3), 1291 (1982); 48 U.S.C. § 1613a (c), (d) (1982).

powers over the Virgin Islands district court in appropriate contexts. *See, e.g., Government of the V.I. v. Bryan*, 818 F.2d 1069, 1074 (3d Cir. 1987) (approving Speedy Trial Plan of the District Court of the Virgin Islands); *Government of the V.I. v. Romain*, 600 F.2d 435, 437 (3d Cir. 1979) (applying criminal procedure "rule adopted by the Supreme Court under its supervisory power over the courts of the United States and, thus, applicable to the courts of the Third Federal Judicial Circuit, of which the District Court of the Virgin Islands is one"). What the majority omits from its discussion of *Frazier*, however, are the factual aspects of that decision that I find dispositive in deciding that we should not employ our discretionary supervisory powers in this instance. First, the *Frazier* Court made factual assumptions that are simply not transferrable to the unique setting of the Virgin Islands. Second, *Frazier* was based on factual findings that are qualitatively different from the disputed facts considered by the Virgin Islands district court. Third, the district court in *Frazier* was not located in a territory; to the extent that our exercise of supervisory power extends beyond the district court to those Virgin Islands courts that function as territorial courts, it is particularly inappropriate.

A.

In *Frazier*, the Supreme Court made a number of assumptions about the typical nonresident lawyer who desires to practice in the Eastern District of Louisiana. It stated, for example, that, "[a]s a practical matter, a high percentage of nonresident attorneys willing to take the [Louisiana] state bar examination and pay the annual dues will reside in places 'reasonably convenient' to the District Court." *Frazier*, 107 S. Ct. at 2613 (quoting *Piper*, 470 U.S. at 286-87). Regarding the in-state office requirement, the *Frazier* Court

asserted that "there is no link between residency within a State and proximity to a courthouse." *Id.*

Although these assumptions made sense in the factual context of the *Frazier* case, they are inapposite here. The expectation that attorneys will endeavor to live in "reasonably convenient" locations, while plausible in the context of the contiguous States, is baseless here. Geographically, no such "reasonably convenient" location exists. *See* Appellee's Brief at 4 ("[a nonresident attorney] who reside[s] a short distance outside our boundaries would be a resident of the high seas"). The Virgin Islands Bar Examiner and Bar Association contend that no such location exists as a practical reality either, due to the inadequate travel and communication services that exist between the Virgin Islands and the mainland. *Id.* at 4-5. Directly at issue, therefore, is the very ability of even the most competent and otherwise available nonresident attorney to secure travel accommodations and effective communication services to the Virgin Islands on short notice.

B.

Frazier was decided on a fully developed record; the district court made relatively straightforward findings of fact after a bench trial. It was uncontested, for instance, that the petitioner's residence in Pascagoula, Mississippi, was "only 110 miles away," *Frazier*, 107 S. Ct. at 2613, from the federal courthouse in New Orleans. The sole justification proffered by the judges of the Eastern District of Louisiana for promulgating their residency requirements was their desire to promote "the efficient administration of justice." *In re Frazier*, 594 F. Supp. 1173, 1183 (E.D. La. 1984). In this regard, the *Frazier* district court found that "the relative unavailability of nonresident counsel seriously impair[ed] the

administration of justice when quick action [wa]s necessary."[5] *Id.* There was also evidence that "lawyers admitted *pro hac vice*, who neither reside[d] nor maintain[ed] an office in Louisiana, fail[ed] to comply with the local rules and impede[d] the efficient administration of justice more than members of the bar of the Eastern District." *Frazier v. Heebe*, 788 F.2d 1049, 1054 (5th Cir. 1986).

In direct contrast, the factual disputes here were resolved by the district court on cross-motions for summary judgment. The record therefore lacks the amount and quality of evidence that would tend to verify the central assertions offered by the Virgin Islands district court in support of the challenged residency requirements. As I discuss below with respect to *Piper*, these asserted justifications are more numerous and complex than those underlying the Eastern District of Louisiana rule in *Frazier*. They include not only the geographical isolation of the Virgin Islands, but also the effect that unavailable nonresident attorneys could have on the already huge caseload of the Virgin Islands district court, *Esposito v. Barnard*, Civil Nos. 206-207/1985, slip op. at 7 (D.V.I. Dec. 8, 1986), *reprinted in* Appendix ("App.") at 86; the administrative problems that would be involved in monitoring the ethical conduct of the nonresident members of the bar, *id.* at 9, *reprinted in* App. at 88;

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5. There was specific testimony concerning the problems caused by unavailability of counsel in proceedings such as emergency depositions pursuant to Fed. R. Civ. P. 30(b)(2), emergency conferences pursuant to Fed. R. Civ. P. 26(c), or conferences regarding temporary restraining orders pursuant to Fed. R. Civ. P. 65(b). In re Frazier, 594 F. Supp. at 1183-84. Other problems described included the court's increased difficulty in conforming to the requirements of Fed. R. Civ. P. 5 and 34, *id.*, and the general unwillingness of nonresident counsel to comply with the rules of the court. Frazier v. Heebe, 788 F.2d at 1056-58 (Goldberg, J., dissenting).

and the Virgin Islands' interest in the enforcement of its provisions for appointing counsel for indigent criminal defendants. Rule 16, V.I.C., tit. 5, App. V (1982). *Esposito*, slip op. at 7-9, *reprinted in* App. at 86-88. With the exception, perhaps, of the concern about the district court caseload,[6] the record evidence regarding each of these concerns differs markedly from the evidence in *Frazier*, where two district judges, two magistrates and the clerk of the Eastern District of Louisiana testified to administrative problems that are common to all federal district courts.

C.

Today's exercise of supervisory power also ignores the "lurking tension," acknowledged by Esposito and De Vos, Transcript of Argument at 9, inherent in striking down a rule promulgated by the Virgin Islands district court that also applies to the territorial courts. Rule 56 governs admission to the bar of the Virgin Islands, which includes the right to practice before the territorial courts. While there is no doubt that the district court of the Virgin Islands is a component part of our federal court system, the territorial courts are not in that same category.[7] Over thirty years ago, our colleague Judge Maris explained the duality as follows:

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6. The majority, relying on *Frazier*, treats the district court's concern about administering its huge caseload as facially invalid. *See* Maj. typescript at 9. This concern takes on a different dimension than that in *Frazier*, however, because of the absolute magnitude of the Virgin Islands district court caseload. For example, statistics available from the Administrative Office of the United States Courts indicate that, within this judicial circuit in 1983, "[t]he Virgin Islands had almost twice as many pending cases per judgeship as the next highest district . . .; almost five times as many new criminal filings per judgeship as the next highest district . . .; and the highest number of civil cases requiring disposition of the districts in the Circuit." App. at 49.

7. Judge Weis does not join this subsection.

> It is settled that Congress has sovereignty over the territories of the United States and accordingly has power to legislate for a territory with respect to all subjects upon which the legislature of a state might legislate within the state . . . And the right of Congress to revise, alter and revoke these delegated powers does not diminish the powers while they reside in the territory . . . *[But t]he aim of Congress is to give the territory full power of local self-determination. The local laws enacted under the legislative power granted by Congress are accordingly territorial laws, not laws of the United States.*

Harris v. Boreham, 233 F.2d 110, 113 (3d Cir. 1956) (emphases added) (citations omitted).[8]

The Revised Organic Act provides that "[t]he legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction." 48 U.S.C. § 1611(b) (1982). These territorial courts of the Virgin Islands, established by local law and exercising jurisdiction defined by local law, are analogous to state courts. Admittedly, there is an inherent ambiguity in the status of the territorial courts, for they share concurrent jurisdiction with the

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8. A footnote in *Harris* expressed this Court's refusal to

> subscribe to the statement . . that local laws continued in force in a territory by virtue of a provision of its organic act are laws of the United States. Such a view denies the existence of an independent, though delegated, sovereignty in the territory and treats its legislature as a mere federal agency.

Harris, 233 F.2d at 113 n.4.

federal district court in some areas, *see* 48 U.S.C. §§ 1611(b), 1612(b)-(c) (1982), and appeals from the decisions of the territorial courts are taken to the district court. 48 U.S.C. § 1613a (Supp. III 1985). Notwithstanding these links between the territorial courts and the federal courts (which have no analogue in the fifty states), I am convinced, as this Court was in *Harris*, that territorial law is not a subset of federal law. Moreover, the fact that Congress specifically made the privileges and immunities clause applicable to the Virgin Islands, 48 U.S.C. § 1561 (1982), indicates the existence of a non-federal element to the Virgin Islands territorial law. *Cf. JDS Realty Corp. v. Government of the V.I.*, 824 F.2d 256, 259 (3d Cir. 1987) (applying commerce clause to the Virgin Islands despite Congressional silence), *vacated and remanded*, ___ U.S. ___, 108 S. Ct. 687 (1988). For all these reasons, I believe that the territorial courts created by territorial law are not mere appendages of our federal court system. They are, instead, creatures of the territorial sovereignty of the Virgin Islands. *Cf. In re Alison*, 837 F.2d 619, 622 (3d Cir. 1988) (Virgin Islands district court, sitting as Appellate Division to territorial court, is more akin to a territorial than to a federal appellate tribunal).

Today's holding, therefore, goes far beyond the boundaries of our previous exercises of our supervisory power over the Virgin Islands district court. Unlike *Bryan*, for example, where this Court, sitting as supervisor, approved "the promulgation by the District Court of the Virgin Islands of a [Speedy Trial] plan . . . including those cases [tried in the district court] based on territorial crimes," 818 F.2d at 1073-74, the impact of today's decision will be felt not only by the Virgin Islands district court in the administration of those cases arising under federal laws, but also by the territorial courts. It is significant that *Bryan* analyzed

the legality of the application of a federal statute to crimes defined by territorial law. In so doing, we relied on *Government of the V.I. v. Ortiz*, 427 F.2d 1043 (3d Cir. 1970), and on *Government of the V.I. v. Lovell*, 378 F.2d 799 (3d Cir. 1967), where this type of analysis was a prerequisite to the exercise of supervisory power over the Virgin Islands district court.

Parsing the territorial and federal aspects of the Virgin Islands courts has practical, as well as legal, import. The admission of nonresident attorneys to the Virgin Islands bar will impose a cost not only upon the federal government but also on the territorial purse. As the Attorney General of the Virgin Islands pointed out, although "[m]any of . . . [the problems created by nonresident attorneys] can be minimized by money . . . , the cost will be substantial and will be well beyond the means of most residents of the Virgin Islands." Brief of Amicus Curiae Government of the Virgin Islands at 6. Furthermore,

> [t]he increased costs inherent in overcoming the barriers of long distances will also increase the already overburdened [Virgin Islands] [g]overnment budget. Both as the primary litigant before the courts and as the entity responsible for the operation of the Territorial Court system, the Government will be forced to assume substantially higher expenses . . . .

Id. at 7. The increased costs of any transaction, whether it be a simple "conference telephone arrangement[]", *Frazier*, 107 S. Ct. at 2613, or a complex trial, will be borne by the territorial fisc. Where even a public defender system is beyond the means of the local government, it is inappropriate for this Court to assert its supervisory powers over the district court as a basis for striking down the residency requirements for *all* the courts within the territory.

The Supreme Court even noted in *Frazier* that its authority to strike down bar residency requirements is arguably less sweeping in the context of state courts, "where laws and procedures may differ substantially from state to state", 107 S. Ct. at 2612 n.7, than it is in the federal context.

D.

Surely the *Frazier* "unnecessary and irrational" test, 107 S. Ct. at 2612, does not articulate a *per se* rule against residency requirements.[9] If anything, the instant case shows that there are wide regional differences within our federal court system. Thus, while *Frazier* recognized that federal district courts are part and parcel of a federal system in which "[t]here is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries," *Frazier*, 107 S. Ct. at 2612 n.7, it also left these courts with enough flexibility to cope with the peculiar circumstances of their districts. If *Frazier* provides any guidance to the instant case, it is that we may, not must, use our inherent supervisory power to

9. At argument, appellants Esposito and De Vos pointed to Justice White's concurring opinion in *Piper*, 470 U.S. at 288-89 (White, J., concurring), as support for their assertion that *Piper* and *Frazier* invalidated residency requirements wholesale. The Virgin Islands Bar Examiner, on the other hand, noted that, at the time of the Court of Appeals' decision in *Frazier*, there were two dozen federal district courts that had residency requirements. *Frazier*, 788 F.2d at 1054 n.7. These requirements were not explicitly invalidated by the Supreme Court, and I believe that their current vitality is an open question. In this regard, I note that the Supreme Court this Term has agreed to review a case involving a privileges and immunities clause challenge to a state bar residency requirement. Supreme Court of Va. v. Friedman, 822 F.2d 423 (4th Cir.), *cert. granted*, 56 U.S.L.W. 3312 (U.S. Nov. 3, 1987) (No. 87-399), *argued* Mar. 21, 1988, 56 U.S.L.W. 3619 (U.S. Mar. 15, 1988).

strike down improper residency requirements. If we do invoke our supervisory authority, we must discern whether the challenged residency requirements are "unnecessary and irrational", *id.* at 2612, by balancing our supervisory interest in preserving "the integrity of the federal system", *id.* at 2612 n.7, against those competing interests articulated by the district court in support of the residency requirements. "Supervisory power" has never been a synonym for raw judicial power, exercised without regard to rational judgments and in the absence of an adequate factual record.

II.

The majority's broad interpretation of the *Frazier* holding gives the Supreme Court, and this Court, unlimited 'supervisory' discretion over federal district courts in an area that has profound constitutional implications. Even if the Virgin Islands bar residency requirements are to be addressed under our supervisory power, our application of *Frazier* should be informed by the *Piper* analysis upon which *Frazier* relies so heavily. If, under the *Piper* test, Rule 56 must be struck down, I would concur in the judgment of the Court. However, the district court's application of *Piper* indicates just the opposite: Rule 56 meets the constitutional requirements of the privileges and immunities clause.

The district court, applying the two-part *Piper* test, decided this matter on cross-motions for summary judgment. Although the parties raised genuine issues of material fact that should have proceeded to trial or at least indicated the need for further discovery,[10] I believe that the district court construed the *Piper* legal test

10. The majority contends that the appellee's affidavits were insufficient to raise genuine issues of material fact. Maj. typescript at 4 n.3. Unless the practice of giving all factual inferences to the non-moving party has lost all of its former meaning, the record compels me to disagree. The Chairman of the Committee of Bar

correctly.[11] Under the first prong of the *Piper* analysis, "[a] 'substantial reason for the discrimination' would not exist . . . 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at

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Examiners of the Virgin Islands bar stated, *inter alia*, that (1) "particularly during what is locally referred to as 'the tourist season' between December and April, reservations may be totally unavailable for commercial flights." App. at 55 (affidavit of Geoffrey Barnard); (2) "[i]t is often difficult to secure a long distance [telephone] connection to a distant point, or to maintain a fully audible conversation without interference from static, voice fade outs, transmission gaps, or disconnections", *id.* at 56 (same); and (3) "[m]ail delivery is often unreliable and almost always involves material delay." *Id.* (same). Similarly, the President of the Virgin Islands Bar Association stated that, "while telecommunications between the Virgin Islands and the continental United States have improved substantially in the last decade, they remain erratic and conversations are frequently impaired by static, echoes, transmission gaps and disconnections." App. at 67 (Affidavit of Patricia D. Steele). These assertions are sufficient in my view to meet the requirements of Fed. R. Civ. P. 56(e) and (f); they raise genuine issues of material fact, and indicate the need for further discovery on the issue of the isolation of the Virgin Islands. The affidavits also indicate genuine issues of material fact with respect to the practical availability of less restrictive means for the accomplishment of the territory's objective. *See id.* at 56-58 (affidavit of Geoffrey Barnard); 67-69 (affidavit of Patricia D. Steele). For example, it is the Committee of Bar Examiners' position that "[t]he resources of the small Virgin Islands bar could never accommodate a serious and adequate investigation into the professional competence . . . or the ethical standards of non-resident lawyers." *Id.* at 57 (affidavit of Geoffrey Barnard).

11. The challenged prospective one year residency requirement of Rule 56(b)(4) is, as counsel for appellee conceded at argument, harder to justify under *Piper* than the Rule 56(b)(5) requirement that the bar applicant state an "inten[tion] to continue to reside in and to practice law in the Virgin Islands." I, too, have serious reservations about any blanket requirement that all applicants to the bar must reside in the Islands for one year prior to application. The validity of a less restrictive rule, however, may have deserved further development at trial.

which the [discriminatory] statute is aimed.'" *Hicklin v. Orbeck*, 437 U.S. 518-526 (1978) (citations omitted). Under the second *Piper* prong, "even where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a 'reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.'" *Id.* (citations omitted). "In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means." *Piper*, 470 U.S. at 284.

A.

With respect to the first prong of *Piper*, i.e., the requirement that there be a "substantial reason for the difference in treatment", between residents and nonresidents, 470 U.S. at 284, the district court found several "substantial reasons" justifying the residency requirements for admission to the Virgin Islands bar and noted in general that *Aronson v. Ambrose*, 479 F.2d 75 (3d Cir. 1973), "expressed complete accord with the view that the reasons for excluding nonresidents from the practice of law [in the Virgin Islands a]re substantial." *Esposito*, slip op. at 5, *reprinted in* App. at 84. In *Aronson*, we rejected an equal protection challenge to the Virgin Islands residency requirement embodied in Rule 56, holding that the territory's geographic isolation and the attendant difficulties in transportation and communication justified the residency requirement.[12]

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12. We noted that

> as a practical matter the Virgin Islands may be reached from the mainland only by travel on limited and, frequently, congested airlines. The case load of the

In this case, the district court found that the geographic isolation of the Virgin Islands from the continental United States still justifies the exclusion of nonresident attorneys. The district court was

> unpersuaded by plaintiffs [sic] argument[] that improvements in air services and other technological advances since the *Aronson* decision have made travel and communication to the Virgin Islands easy and accessible. The number of flights to [the] Virgin Islands have increased since *Aronson*. The number of tourists traveling to the Virgin Islands, however, has likewise increased. Air travel on short notice remains difficult, if not impossible. Telephone service is erratic and frequently connections between the mainland and the territory are unavailable. Equally undependable are the services [that] provide for the transport of materials and documents to and from the mainland.

Esposito, slip op. at 6, *reprinted in* App. at 85.

The quality and availability of travel, telephone and delivery services to the Virgin Islands are "material fact[s]", *Anderson v. Liberty Lobby,Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2510 (1986), to the legal determination whether a substantial reason exists for the discriminatory treatment. The geographical isolation of the Virgin Islands may be mitigated by such services. If they are as inadequate as the district

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> district court is continually increasing and it would be intolerable if the court were compelled to depend, even in part, on lawyers living and practicing on the mainland more than a thousand miles away to answer urgent motion calls, attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants.

Aronson, 479 F.2d at 78.

court perceived them to be, however, then the isolation of the Virgin Islands is certainly an "indicat[ion] that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed." *Hicklin*, 437 U.S. at 525-26 (quotations omitted).[13]

The district court also found that the effect of inevitable delays caused by unavailable nonresident attorneys on the burgeoning case load of the district courts was a "substantial reason" justifying retention of the residency requirements. *Esposito*, slip op. at 7, *reprinted in* App. at 86. This determination was also rooted in the geographic isolation of the territory from the continental United States. The district court began its assessment of the probable effect of the admission of nonresident attorneys on the Virgin Islands case load by noting the "vast disparity," *id.* at 7, between the pending cases per average judgeship in the United States district courts and the pending cases per judgeship in the Virgin Islands district courts for the same year.[14] Noting the "pressing responsibility upon the judges of [the Virgin Islands] . . . to efficiently manage their caseloads," the district court explained further that "[i]nterruptions to accommodate delays

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13. It is my view that the adequacy of travel and communication services between New York City or Miami and the Virgin Islands, as raised in appellant De Vos' affidavit, App. at 39-40, tell only part of the story. At the very least, there is no guarantee that all nonresident attorneys will hail from the New York area or other well-served markets.

14. There are only two federal judges in the Virgin Islands: The Honorable Almeric L. Christian, who sits in Charlotte Amalie, and The Honorable David V. O'Brien, who sits in Christiansted. The district court noted that statistics issued by the Administrative Office of the United States Courts for the year 1983 indicate that there were, on average, 481 pending cases per judgeship in the district courts, whereas in the Virgin Islands there were 781 pending cases per judgeship. *See Esposito*, slip op. at 7, *reprinted in* App. at 86; *supra* note 4.

occasioned by nonresident lawyers attempting to reach the islands, not to mention claimed conflicts respecting court appearances in the mainland jurisdictions in which they practice, cannot be countenanced." *Id.* at 7, *reprinted in* App. at 86. Repeated interruptions of court proceedings to accommodate the travel difficulties and scheduling conflicts of nonresident attorneys would no doubt disrupt the efficient movement of the court's docket and thus exacerbate the already heavy case load in the Virgin Islands. In my view, preventing such an "evil", *Hicklin*, 437 U.S. at 525-26, would be a substantial reason for the discriminatory treatment of nonresidents. The absolute magnitude of the Virgin Islands district court's caseload, coupled with the travel difficulties between the mainland and the Islands, reflects why this case, unlike *Frazier*, presents a legitimate concern regarding the "efficient administration of justice." 107 S. Ct. at 2612.

The district court also mentioned the "[in]ability of the courts and the bar to monitor and insure the ethical conduct of . . . lawyers who do not reside in the territory." *Esposito*, slip op. at 9, *reprinted in* App. at 88. In *Piper*, the Supreme Court noted that "[t]he New Hampshire Bar would be able to discipline a nonresident lawyer in the same manner in which it disciplines resident members." 470 U.S. at 286 n.20. By contrast, the Virgin Islands Board of Bar Examiners and the Virgin Islands Bar Association contend that the costs and difficulty of investigating and disciplining unethical nonresident lawyers cannot be accommodated by the tiny Virgin Islands bar. App. at 56-57 (affidavit of Geoffrey Barnard); *id.* at 68-69 (affidavit of Patricia D. Steele). There is no assumption here that nonresident lawyers will be less ethical than resident lawyers. The concern expressed by the bar here is simply the added cost of disciplining

nonresident lawyers, given its limited resources and its geographic distance from those lawyers it would have to oversee.

Finally, the district court found that the "most compelling" reason, *Esposito*, slip op. at 7, *reprinted in* App. at 86, to retain the residency requirement was the Virgin Islands' interest in the enforcement of Rule 16, V.I.C., tit. 5, App. V (1982).[15] Under Rule 16, all active members of the Virgin Islands bar are appointed on a rotating basis to represent indigent criminal defendants. Once appointed, each attorney must accept the assignment. Substitution is not permitted absent a court order. Attorneys appointed pursuant to Rule 16 must "communicate with the defendant at his [or her] place of incarceration . . . no[] later than five days from the date of the clerk's mailing of the order of appointment." *Id.* Citing the delay in mail delivery, the difficulty in securing travel arrangements and the pressures of complying with the Speedy Trial Act, 18 U.S.C. § 3161 (1982), the district court concluded that Rule 16 justifies the exclusion of nonresident attorneys from the Virgin Islands bar. *Esposito*, slip op. at 7-9, *reprinted in* App. at 86-88.

Rule 16's dual goal of ensuring adequate representation for indigent criminal defendants and the full participation of all members of the Virgin Islands' bar constitutes another substantial reason for discriminating against nonresident attorneys. This is so, at a minimum, because of the high risk of (1) inadequate notice to the attorney of his or her assignment by virtue of slow mail delivery, and (2) the

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15. Rule 16 is the "[p]lan of the District Court of the Virgin Islands promulgated to implement the Criminal Justice Act of 1964." Rule 16, V.I.C., tit. 5, App. V (1982). This rule was not attacked by Esposito or De Vos in their complaints, and no attack on its validity is properly before us.

nonresident attorney's failure to comply with the communication requirement of the rule, in person or otherwise, by virtue of the inadequacy of travel and telephonic services. Esposito and De Vos do not vigorously dispute that Rule 16 is a "substantial reason" for the discriminatory treatment under the first prong of *Piper*. They reserve their most vehement attack for the district court's conclusion that, under *Piper*'s second prong, the exclusion of nonresidents bears a substantial relationship to the objective of implementing Rule 16. Specifically, they argue that there are various "less restrictive means", 470 U.S. at 284, other than exclusion of nonresident attorneys from the Virgin Islands bar, by which Rule 16 can be implemented. This contention is discussed below.

B.

The district court concluded that "the discrimination practiced against nonresidents, if indeed such be the case, is the least restrictive means of preventing the harm which would be caused by the admission of nonresident attorneys to the bar." *Esposito*, slip op. at 9-10, *reprinted in* App. at 88-89. Esposito and De Vos argue strenuously that, at least with respect to Rule 16, there are several less restrictive means of ensuring adequate representation to indigent criminal defendants. Among their suggestions are: (1) "assigning . . . cases to attorneys who have become members of a pool of criminal defense attorneys by virtue of their experience and willingness to participate," Appellants' Brief at 17; (2) requiring "the association of nonresident attorney[s] with [attorneys] . . . who reside[] in the territory," *id.*; (3) funding the legal representation of indigent criminal defendants by resident attorneys via interest that could be accrued on attorney trust accounts, Transcript of Argument at 15-17, or (4) funding such representation by

imposition of a license or registration fee on nonresident attorneys. *Id.* at 17.

Each of these suggested "less restrictive means" overlooks one central fact: Rule 16 ensures that *all* lawyers who benefit from being members of the Virgin Islands bar share equally and directly in the responsibility of representing indigent criminal defendants. None of the purported alternatives, in other words, offers a less restrictive means to the end of Rule 16; moreover, *Piper*'s "less restrictive means" analysis does not require a jurisdiction to give preferential treatment to nonresident members of the bar.

Notwithstanding the mandatory participation characteristic of Rule 16, the majority concludes -- without offering specific guidance -- that "alternative resolutions to this problem are the answer." Maj. typescript at 7. The majority, refusing even to analyze the district court's reasoning in the peculiar setting of the Virgin Islands, relies instead on a blanket assertion that similar arguments were rejected in *Frazier*. *Id.* at 6-7. If these "alternative resolutions" to Rule 16 are so obvious, then it is puzzling that the majority does not craft the precise rule that should be adopted by the Virgin Islands in Rule 16's place. This approach illustrates concretely the danger that "[less restrictive means] analysis, when carried too far, will ultimately lead to striking down almost any statute on the ground that the Court could think of another 'less restrictive' way to write it." *Piper*, 470 U.S. at 294-95 (Rehnquist, J., dissenting) (citations omitted). I cannot agree with this cursory approach to a very serious question, the resolution of which will affect profoundly the functioning of the Virgin Islands bar.

It is troubling that today's decision turns the privileges and immunities clause on its head by sanctioning discrimination *against* Virgin Islands

resident attorneys. It is even worse that the majority promotes this perverse result without even inquiring into whether nonresident attorneys from jurisdictions as far away as New York and New Jersey can assume efficiently their fair share of the obligation of a Virgin Islands lawyer in criminal appointment cases. Were the district court's construction of the facts to be proven at a trial, then the residency requirements of Rule 56 would survive scrutiny under the second prong of *Piper* and should be sustained.[16]

III.

The majority's unwillingness to confront the central factual and legal issues is a disservice to the members of the Virgin Islands bar, and more important, to the people they serve. Underlying the district court's reasoning in support of the bar residency requirement is the premise that travel and communications to the Islands are neither easy nor reliable. The majority, however, does "not believe that the parties' disagreement over the ease of travel and communications between the Virgin Islands and the continental United States is an issue of material fact." Maj. typescript at 4. In its view, a truly peculiar geographic setting has no relevance in determining whether a challenged residency provision violates the privileges and immunities clause or should be invalidated pursuant to our supervisory powers.

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16. I do not address the application of *Piper*'s second prong to the other "substantial reasons" advanced by the district court. I note, however, that the same resource constraints that affect the analysis of Rule 16 might be applicable with respect to the other reasons. For example, in disciplining unethical nonresident attorneys, the Virgin Islands bar could charge nonresidents an enforcement fee or discipline unethical lawyers under its disciplinary rules. *See Piper*, 470 U.S. at 286 n.20. It is unclear, however, whether these "alternatives" present workable solutions in the isolated setting of the Virgin Islands. *See supra* note 8.

No meaningful analogies can be drawn between the facts of *Piper* and *Frazier*, and those before us. Unlike New Hampshire and Vermont, or Mississippi and Louisiana, which share borders, no state or territory of the United States is contiguous to the Virgin Islands. Unlike *Piper* and *Frazier*, no two-hour highway drive can transport appellants from their resident states of New York and New Jersey to the Virgin Islands district court of St. Croix or St. Thomas. Unlike *Piper* and *Frazier*, the ability of appellants to communicate effectively with clients, other attorneys, agencies and courts, by telephone and mail services, is disputed. Most significantly, unlike *Frazier*, where petitioner stressed no less than a dozen times in his brief to the Supreme Court that his home and office were closer to the district court than were those of many resident Louisiana state bar members, appellants here are geographically further from the district court, by more than a thousand miles and an ocean, than all resident members of the Virgin Islands bar. A residency requirement predicated on these obvious facts is neither "unnecessary" nor "irrational." *Frazier*, 107 S.Ct. at 2612.

I find it particularly disheartening that the distinguished federal judges of this Court have so easily written off as irrelevant their own experiences with the transportation and communication problems that plague the Virgin Islands. Even if only some members of this Court have had the frustrating experience of mailing case files to the Virgin Islands weeks before a sitting, only to learn that they are not available when they arrive to hear argument, or have had their judicial patience tested as they have waited for the connection of a phone call between the continental United States and the Virgin Islands, we should heed Chief Justice Taft's pointed observation that "[a]ll others can see and understand this. How can we properly shut our minds to it?" *Bailey v. Drexel*

Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 37 (1922), *quoted in Gomillion v. Lightfoot*, 270 F.2d 594, 608 (5th Cir. 1959) (Brown, J., dissenting), *rev'd*, 364 U.S. 339 (1960).

The ultimate tragedy of the majority's decision is that, by ignoring the lessons of experience, it unnecessarily but significantly weakens the independence and the vitality of the Virgin Islands bar. One predictable result of this decision is that those lawyers who are willing to practice full time in the Virgin Islands and to make it their primary residence will soon be required to assume a disproportionate burden of representing Virgin Islands defendants in court-appointed criminal cases. This result seems inevitable; the only question is whether local counsel will appear in their own capacity for indigent defendants or as the reluctant representatives of unavailable nonresident attorneys. The majority, perhaps unwittingly, imposes this foreseeable burden on resident attorneys solely because nonresident attorneys such as Esposito and De Vos want the advantage of a dual practice in the mainland and in the Virgin Islands, despite their inability to discharge effectively the responsibilities of the latter practice. In my view, this arrangement is too much to ask of the resident members of the Virgin Islands bar.

For all these reasons, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3034
No. 87-3035

SUSAN ESPOSITO

v.

GEOFFREY W. BARNARD, in his capacity as chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally

and

LLOYD DE VOS

v.

GEOFFREY W. BARNARD, in his capacity as chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally

Susan Esposito Thorstenn
and Lloyd De Vos,
Appellants

Appeal from the District Court
of the Virgin Islands--St. Thomas

D.C. Civil No. 85-0206
D.C. Civil No. 85-0207

Argued: Tuesday, April 28, 1987

BEFORE: SEITZ, HIGGINBOTHAM, and ROSENN, *Circuit Judges*.

Filed: September 30, 1987

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

Plaintiffs Susan Esposito Thornstenn and Lloyd De Vos appeal the order of the district court granting the defendant's motion for summary judgment. This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

Thorstenn and De Vos applied for admission to the bar of the Virgin Islands. Thorstenn is a resident of New York; De Vos is a resident of New Jersey. Both are members in good standing of the New York and New Jersey bars.

Under the Rules of the District Court of the Virgin Islands, an applicant must live in the Virgin Islands for one year before applying for admission to the bar, and must state his or her intention to reside in the Virgin Islands. 5 V.I.C., App. V, Rules 56(b)(4),(b)(5) (1982). Because Thorstenn and De Vos did not comply with these residency requirements, they were denied admission to the Virgin Islands bar.[1]

The plaintiffs filed these actions, alleging that the residency requirement of the Virgin Islands violated the privileges and immunities clause of the constitution and seeking to enjoin the enforcement of such rule.[2] Both the plaintiffs and the defendant filed motions for summary judgment with supporting

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1. The district court permitted the plaintiffs to sit for the Virgin Islands bar examination, while reserving the issue of their eligibility for admission to the bar. Both plaintiffs passed the bar examination. Thus there is no dispute that the only reason they were denied admission is because they are nonresidents of the Virgin Islands.

2. The privileges and immunities clause of the United States Constitution has been extended to the Virgin Islands by the Revised Organic Act. 48 U.S.C. § 1651 (1982).

affidavits. De Vos reported that he had not experienced trouble traveling to the Islands. In contrast, Barnard, in his affidavit, maintained that travel service between the continental United States and the Virgin Islands was difficult and erratic. The parties also disagreed about the quality of the telecommunications between the Islands and the mainland. In view of our disposition of the legal issue presented in this case, however, we do not believe that the parties' disagreement over the ease of travel and communications between the Virgin Islands and the continental United States is an issue of material fact.

The district court granted the defendants' motion for summary judgment on the ground that the unique conditions in the Virgin Islands justified the residency requirement, and thus the requirement did not violate the privileges and immunity clause as applied in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). In support of this conclusion, the district court relied on the geographical isolation of the Virgin Islands from the continental United States, the delay in publication of local decisions, the case load in the district court, the need to ensure that its lawyers are ethical, and the rule governing the appointment of counsel for indigent criminal defendants. This appeal followed.

While this appeal was under advisement, the Supreme Court of the United States handed down its decision in *Frazier v. Heebe*, 107 S. Ct. 2607 (1987). The Court, relying on its supervisory power, invalidated certain attorney residency and office requirements contained in the local rules of the United States District Court for the Eastern District of Louisiana.

We requested and received comments from the parties on the applicability of *Frazier v. Heebe* to this case because of the established policy favoring a

non constitutional disposition, if possible. We now address that issue.

The petitioner in *Frazier v. Heebe* was a Mississippi attorney. He applied for admission to the bar of the United States District Court for the Eastern District of Louisiana. His application was rejected because he admittedly did not comply with the provisions of the local rules noted above.

The district and circuit courts refused to invalidate the local rules. Those courts concluded that the requirements facilitated the efficient administration of justice because nonresident attorneys allegedly are less competent and less available to the court than are resident attorneys. The Supreme Court granted certiorari. 107 S. Ct. 454 (1986). It thereafter decided that "[p]ursuant to our supervisory authority, we hold that the district court was not empowered to adopt its local rules to require members of the Louisiana bar who apply for admission to its bar to live in or maintain an office in Louisiana where the court sits." 107 S. Ct. at 2611. It found that the reasons given for the residence requirement to be unnecessary and irrational.

First, the Court stated that no empirical evidence demonstrated why the district court was justified in discriminating against one of two classes of attorneys who were members of the Louisiana bar. The Court went on to say that there is no reason to believe that nonresident attorneys who have passed the Louisiana bar exam are less competent than resident attorneys. *See* 107 S. Ct. at 2612-13. There is no suggestion that the situation is otherwise in the Virgin Islands.

The Court next concluded that it did not agree that the alleged need for immediate availability of attorneys in some proceedings requires a blanket rule that denies all nonresident attorneys admission to a district court bar. *See id.* at 2613. The Court pointed out that

improvements in communications minimizes the problem of availability, and that alternative resolutions are possible.

The Court thereupon held that the residency requirement imposed by the Eastern District is unnecessary and arbitrarily discriminates against out of state attorneys.[3]

The reasons advanced here in support of the validity of the local rules for the district court of the Virgin Islands are essentially the same as those rejected in *Heebe* for lack of inherent merit. Indeed, the district court found that the most compelling reason for excluding nonresidents was the need to have counsel available in criminal cases. The Supreme Court, however, has concluded that alternative resolutions of this problem are the answer.

Because the Court invoked its supervisory power in *Frazier v. Heebe*, in a context that must be viewed as generally applicable to the United States district courts, we have no doubt that it is binding precedent here unless the status of the district court of the Virgin Islands dictates otherwise. The district court of the Virgin Islands is, of course, not a United States District Court. It was created by an act of Congress and exercises exclusive federal jurisdiction in that Territory under the Revised Organic Act, 48 U.S.C. § 1612 (1982).

Given the integrated status of the Virgin Islands in the federal court system, 28 U.S.C. § 1291, 28 U.S.C. § 1254, we have no doubt that the United States Supreme Court has supervisory authority over the District Court of the Virgin Islands. Under 28 U.S.C.

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3. The Court went on to invalidate the in-state office requirement in the rules. We need not address that issue since the local rules of the Virgin Islands do not impose an on-island office requirement.

§ 2071 (1982), local rules adopted by United States courts, including those of the district court of the Virgin Islands, must "be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." *See also* 28 U.S.C. § 2072 (1982). We thus conclude that the Supreme Court's ruling in *Frazier v. Heebe* requires that we invalidate the provisions of 5 V.I.C. App. V, Rules 56(b)(4),(b)(5)(1982) to the extent that they require an applicant to live in the Virgin Islands for one year before applying for admission to the district court bar and to state that it is his or her intention to reside in the Virgin Islands.

The appellants argue that the supervisory power should not be exercised to invalidate the residency requirement because the supervisory power is used only in unique circumstances, usually criminal cases. This argument, however, is unpersuasive in light of the decision by the Supreme Court to employ its supervisory powers to invalidate the residency requirement imposed by the Eastern District of Louisiana. Indeed, the dissent in *Heebe* focused on whether it was appropriate to rely on the Court's supervisory powers in the case. *See* 107 S. Ct. at 2614-16 (Rehnquist, C.J., dissenting).

Moreover, we disagree with the appellants' assertion that the facts in this case dictate a different result than that reached by the Supreme Court. As indicated above, the justifications offered by the district court in this case were essentially the ones rejected in *Heebe*. Thus, even against the remote possibility that we are not bound to apply *Frazier v. Heebe* here, we believe that in the exercise of our clearly established supervisory power over the district court of the Virgin Islands, *Government of the Virgin Islands v. Bryan*, slip op. (3d Cir. May 14, 1987), we would be compelled, by parity of reasoning to that

employed in *Heebe*, to apply our supervisory power, *see LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957), to invalidate the residence requirements in the rules.[4]

Accordingly, the judgment of the district court will be reversed and the case remanded with instructions to enter summary judgment in favor of the plaintiffs.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting.

Today the majority holds that the Supreme Court's decision in *Frazier v. Heebe*, ___ U.S. ___, 107 S. Ct. 2607 (1987), requires that we invalidate the residency requirements for admission to the Virgin Islands bar. Because I believe that the district court properly construed the Supreme Court's prior decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), that *Heebe* does not alter the applicable analysis, and that specifically, on this record, there exists a genuine issue of material fact as to whether the unique circumstances of the Virgin Islands justify the challenged residency requirement, I respectfully dissent.

I.

In *Piper*, the Supreme Court held that the exclusion of a nonresident from bar admission in New Hampshire runs afoul of the privileges and immunities clause of article IV, section 2 of the Constitution. The Court noted, however, that "'[l]ike many other constitutional provisions, the privileges and

4. In view of our determination, we need not resolve the constitutional attack on the rules based on the Privilege and Immunities and Equal Protection Clauses.

immunities clause is not an absolute.'" 470 U.S. at 284 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). Rather, the *Piper* Court explained that "[t]hat clause does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Id.* Under the first prong of the *Piper* analysis, "[a] 'substantial reason for the discrimination' would not exist . . . 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed.'" *Hicklin v. Orbeck*, 437 U.S. 518, 525-25 (1977) (quoting *Toomer*, 334 U.S. at 396). Under the second, "even where the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a 'reasonable relationship between the danger presented by non-citizens, as a class, and the . . . discrimination practiced upon them.'" *Id.* "In deciding whether the discrimination bears a close or substantial relationship to the States' objective, the Court has considered the availability of less restrictive means." *Piper*, 470 U.S. at 284.

Applying the *Piper* analysis to the facts of this case, the district court concluded that the residency requirement met the standards of *Piper* under both prongs. After argument in this case, the Supreme Court issued its decision in *Heebe*. Thereafter, we properly considered the applicability of *Heebe* to determine whether disposition was appropriate on a non-constitutional basis. Because I think that *Heebe* provides no such basis, and that the majority's analysis conveniently ignores central factual issues, I shall address the applicability of both *Piper* and *Heebe* to the facts of this case. I turn first to what I believe is the proper application of *Piper*.

II.

The district court found several "substantial reasons" justifying the residency requirement for admission to the Virgin Islands bar. In general, the district court noted that the decision of this Court in *Aronson v. Ambrose*, 479 F.2d 75 (3d Cir. 1973), "expressed complete accord with the view that the reasons for excluding nonresidents from the practice of law [in the Virgin Islands] were substantial." Appendix ("App.") at 84. In *Aronson*, this Court rejected an equal protection challenge to the Virgin Islands residency requirement embodied in Rule 56, holding that the territory's geographic isolation and the attendant difficulties in transportation to and communication with the Islands justified the residency requirement.[1] Similarly, the district court here first found that the geographic isolation of the Virgin Islands from the continental United States remains a substantial reason justifying the exclusion of nonresident attorneys. Specifically, the district court stated:

> We are unpersuaded by plaintiffs arguments that improvements in air services and other technological advances since the *Aronson* decision

1. The *Aronson* Court noted that

> as a practical matter the Virgin Islands may be reached from the mainland only by travel on limited and, frequently, congested airlines. The case load of the district court is continually increasing and it would be intolerable if the court were compelled to depend, even in part, on lawyers living and practicing on the mainland more than a thousand miles away to answer urgent motion calls, attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants.

479 F.2d at 78.

> have made travel and communication to the Virgin Islands easy and accessible. The number of flights to [the] Virgin Islands have increased since *Aronson*. The number of tourists traveling to the Virgin Islands, however, has likewise increased. Air travel on short notice remains difficult, if not impossible.
>
> Telephone service is erratic and frequently connections between the mainland and the territory are unavailable. Equally undependable are the services [that] provide for the transport of materials and documents to and from the mainland.

App. at 85.

After identifying geographic isolation as a special circumstance distinguishing this case from *Piper*, the district court proceeded further to explain why a different legal conclusion was mandated on these facts. First, the district court noted that, with the extreme delay in publication of local opinions in the peculiar context of the Virgin Islands,[2] "the ability of nonresident attorneys to keep up with developments in local law would . . . be substantially impaired by such counsel's absence from the jurisdiction." App. at 85. In other words, even the most conscientious nonresident attorney would be severely handicapped by the inadequate travel and communication services from keeping abreast of recent developments in local law. Conversely, resident attorneys, although similarly inconvenienced by such delays, have actual access to controlling slip opinions, recent statutes, rules and

2. The district court indicated that publication delays can extend over a number of years. For example, the district court noted that the 1985 edition of the Virgin Islands Reports contains opinions rendered in 1983 and early 1984. *See* App. at 86.

regulations that are available in the clerks' offices of the respective courts or in the district court libraries.[3] *See* App. at 86; Appellees' Brief at 7. Unlike the situation in *Piper*, this Court is not asked to, and the district did not, assume that nonresidents will be less likely to know local rules and decisions, or that the nonresidents will not attempt to learn recent, unpublished opinions by having local counsel forward the decision. Instead, the district court recognized that, given the inadequate travel and communication services, including mail and telephone, to and from the Islands, the most diligent attempt by a nonresident attorney to remain current would likely be unsuccessful. The majority apparently views the delay of publication in isolation rather than in the context in which the delay occurs. In my opinion, this failure to consider the unique situation in the Virgin Islands renders the majority's determination faulty at the outset.

The district court next cited the effect of inevitable delays caused by unavailable nonresident attorneys on the burgeoning case load of the district courts as a substantial reason justifying retention of the residency requirement in the Virgin Islands. Again, the district court's determination that the admission of nonresident attorneys would exacerbate the existing administrative burden, and thus justified their exclusion, was clearly rooted in the geographic isolation of the territory from the continental United States. The district court began its assessment of the probable effect of the admission of nonresident attorneys on the Virgin Islands case load by noting the

3. Indeed, the district court noted that "[c]opies of current statutes and rules [applicable to territorial administrative agencies] are unavailable *except* in the district court libraries." App. at 86 (emphasis added).

"vast disparity," App. at 86, between the pending cases per judgeship on the average in the United States district courts and the pending cases per judgeship in the Virgin Islands district courts for the same year.[4] Noting the "pressing responsibility upon judges of [the Virgin Islands] . . . to efficiently manage their caseloads," the district court explained further that "[i]nterruptions to accommodate delays occasioned by nonresident lawyers attempting to reach the islands, not to mention claimed conflicts respecting court appearances in the mainland jurisdictions in which they practice, cannot be countenanced." App. at 86. As indicated above, "'[a] 'substantial reason for the discrimination' w[ill] not exist . . . 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed.'" *Hicklin*, 437 U.S. at 525-26 (quoting *Toomer*, 334 U.S. at 398) (bracket in *Hicklin*). As I read the district court's opinion, the "evil" with which it associated the residency requirement was the undue delay in the administration of justice, not the increasing case load itself. Even assuming that the threatened "evil" is the large case load, however, there is no requirement that nonresidents constitute the ultimate source of the problem. That "the presence or activity of nonresidents causes *or exacerbates* the problem the State seeks to remedy," *Hicklin*, 437 U.S. at 526 (emphasis added), is sufficient as long as the

4. There are only two federal judges in the Virgin Islands: The Honorable Almeric L. Christian, sitting in Charlotte Amalie, and The Honorable David V. O'Brien, sitting in Christiansted. The district court noted that statistics issued by the Administrative Office of the United States Court for Federal Court Management for the year 1983 indicate that there were on average 481 pending cases per judgeship in the district courts, whereas in the Virgin Islands there were 781 pending cases per judgeship. *See* App. at 86.

discrimination is reasonably designed to prevent the targeted danger. Clearly, repeated interruptions in court proceedings to accommodate travel difficulties and schedule conflicts of nonresident attorneys will disrupt the efficient movement of the court's docket and thus exacerbate the already heavy case load in the Virgin Islands. In my view, the prevention of either evil presents a legitimate and substantial reason for the discriminatory treatment of nonresidents.

The district court also mentioned the "[in]ability of the courts and the bar to monitor and insure the ethical conduct of . . . lawyers who do not reside in the territory." App. at 88. In my view, the legitimate goal of ensuring ethical conduct ordinarily may be achieved through less restrictive means. For instance, the Virgin Islands bar could charge nonresidents an enforcement fee or discipline unethical lawyers under its disciplinary rules. *See Piper*, 470 U.S. at 285. Here, however, it is unclear whether these alternatives present workable solutions in the isolated region of the Virgin Islands: neither alternative would remedy or alleviate the central problems the district court identified, namely, the difficulty of obtaining prompt correspondence through the mails or by phone with regard to any allegation of unethical conduct by a nonresident attorney. Moreover, the cost of the Islands' enforcement burden may vary wildly depending on whether the nonresident attorney resides in Florida or Oregon. And it is of course obvious that discipline cannot be imposed unless and until the allegations of unethical conduct are investigated and proved. In sum, I simply cannot conclude with confidence that the interest of the Virgin Islands bar in ensuring ethical conduct of nonresident attorneys does not constitute a substantial reason or that total exclusion is not the least restrictive means of meeting that burden.

Finally, the district court found that the "most compelling" reason for retention of the residency requirement was the Islands' interest in the enforcement of Rule 16. Under Rule 16, all active members of the Virgin Islands bar are appointed on a rotating basis to represent indigent criminal defendants. Once appointed, each attorney must accept the assignment. Substitution is not permitted absent a court order. Attorneys appointed pursuant to Rule 16 must "communicate with the defendant at his place of incarceration . . . no[] later than five days from the date of the clerk's mailing of the order of appointment." 5 V.I.C., App. V (1982). Citing the delay in mail delivery, the difficulty in securing travel arrangements and the pressures of complying with the Speedy Trial Act, 18 U.S.C. § 3161 (1982), the district court concluded that Rule 16 justifies the exclusion of nonresident attorneys from the Virgin Islands bar.

Notwithstanding the mandatory provisions of Rule 16, the majority concludes, without offering any specific suggestions, that "alternative resolutions to this problem are the answer." Maj. typescript at 7. The majority refuses to even analyze the district court's reasoning in the peculiar setting of the Virgin Islands. Instead it relies on the blanket assertion that similar arguments were rejected in the very different factual setting of *Heebe*. Maj. typescript at 6-7. I respectfully disagree with this cursory approach to a very serious question, the resolution of which will have a profound impact on the functioning of the Virgin Islands bar.

Under the first prong of *Piper*, it is clear that Rule 16 and its dual goal of ensuring adequate representation for indigent criminal defendants and the full participation of all members of the Virgin Islands' bar constitutes a substantial reason for discriminating against nonresident attorneys. This is

so, at a minimum, because of the high risk of (1) inadequate notice to the attorney of his or her assignment by virtue of slow mail delivery and (2) the nonresident attorney's failure to comply with the communication requirement of the rule, in person or otherwise, by virtue of the inadequacy of travel and telephonic services. Neither reason nor chance suggests that resident attorneys, as a class, vacation en masse. Conversely, nonresident attorneys, as a class, are by definition customarily absent from the Islands. Thus, it is, in my view, reasonable to conclude that nonresident attorneys present a much greater danger to the efficient operation of the Virgin Islands' court system than do resident attorneys, who are vacationing, ill or even irresponsible.

The tragedy of the majority's decision is that it hammers an unnecessary nail that weakens significantly the independence and the vitality of the Virgin Islands bar. Today's decision represents an unjustified intrusion upon the ability of the Virgin Islands legitimately to regulate its own bar. The unfortunate result of the majority's decision is that those lawyers who are willing to practice full time in the Virgin Islands and make their primary residence in that territory will now be required to assume a disproportionate burden in representing Virgin Islands defendants in court-appointed criminal cases. This result is inevitable whether local counsel appear in their own capacity for indigent defendants or as representatives of unavailable nonresident attorneys -- an alternative that is, of course, proscribed by Rule 16. Nor would a requirement that local counsel promptly notify nonresident attorneys of the orders of appointment address the alleged problems or alleviate the anticipated burden. Local counsel's time could be unceasingly tied up in futile attempts to contact nonresident attorneys via inadequate communication

services. Nevertheless, the majority, perhaps unwittingly, imposes this additional burden solely because appellants want the advantage of a dual practice in the mainland and in the Virgin Islands, notwithstanding the alleged inability to discharge effectively their responsibilities within the territory. In my view, there is simply no way that this Court can accommodate the desire of the appellants from New York and New Jersey -- jurisdictions that are over 1,000 miles away -- to be admitted to practice in the Virgin Islands without imposing an unreasonable burden on the rest of the Virgin Islands bar. The privileges and immunities clause, which was designed to prevent discrimination against nonresidents, here has been turned on its head to discriminate affirmatively against residents. The majority sanctions this perverse result without even the slightest inquiry into whether nonresident attorneys from jurisdictions as far away as New York and New Jersey can assume efficiently their fair share of the obligation of a Virgin Islands lawyer in criminal appointment cases. In sum, I believe that the discrimination practiced upon nonresident attorneys, under the district court's construction of the facts, is directly tailored to respond to the gravity of the threat presented by nonresident attorneys. If, then, the district court's construction of the facts is accurate, Rule 56 survives scrutiny under the second prong of *Piper* and must be sustained.

III.

The majority's unwillingness to confront the central factual issues commits an inexcusable disservice to the members of the Virgin Islands bar. The underlying premise of the district court's reasoning in support of the bar residency requirement is that travel and communications to the Islands are neither easy nor accessible. Indeed, the majority

explicitly acknowledges that "[t]he district court granted defendants' motion for summary judgment on the ground that the unique conditions in the Virgin Islands justified the residency requirement." Maj. typescript at 4. Notwithstanding this acknowledgment, the majority does "not believe that the parties' disagreement over the ease of travel and communications between the Virgin Islands and the continental United States is an issue of material fact." *Id.* Under the majority's analysis, peculiar factual settings have little or no relevance in determining whether the challenged provision violates the privileges and immunities clause or justifies invalidation of a rule pursuant to our supervisory powers. Yet the major thrust of the *Piper* test is the determination whether *particular* reasons justify the disparate treatment of nonresidents.

Heebe is not to the contrary. Indeed, *Heebe* reinforces my ultimate conclusion that the residency requirement for admission to the Virgin Islands bar should be upheld if the underlying premise of the district court's opinion is true.[5] In *Heebe*, the Supreme Court invoked its supervisory powers to invalidate Louisiana's residency requirement for admission to practice in the federal courts for the Eastern District of Louisiana. Under Local Rule 21.2, the Eastern District of Louisiana required that, to be admitted to its bar, an attorney must reside or maintain an office in the State. The district court in *Heebe* had determined that "the in-state attorney's admission to the bar 'does not raise the same concern for the efficient administration of justice that admission of nonresident attorneys does.'"

5. In my view, whether *Piper* or *Hebbe* governs, the bar residency requirement for the Virgin Islands cannot be assessed properly without first determining the ease and adequacy of travel and communication services between the Virgin Islands and the continental United States.

107 S. Ct. at 2611 (quoting *In re Frazier*, 594 F. Supp. 1173, 1184 (E.D. La. 1984)). Affirming the judgment of the district court, the Court of Appeals held that exclusion of nonresident attorneys was rationally related to the district court's goal of promoting lawyer competence and availabilty for hearings.

On review, the Supreme Court reversed, finding both the in-state residency and the in-state office requirements unnecessary and irrational. The *Heebe* analysis, however, parallels that employed in *Piper*. First, examining the in-state residency requirement, the Court found irrelevant empirical evidence concerning the behavior of *pro hac vice* practitioners. "Experience with this category of one-time or occasional practitioners," the Court observed, "does not provide a basis for predicting the behavior of attorneys, who are members of the Louisiana bar and who seek to practice in the Eastern District on a regular basis." *Hebbe*, 107 S. Ct. at 2612. The Court also rejected the assumption that nonresident attorneys, as a class, would fail to familiarize themselves with the local rules. Instead, the Court considered the converse to be more likely because of the personal investment made by the nonresident attorney in taking the Louisiana bar and paying its annual dues. *Id.* at 2612-13. Finally, the Court found unpersuasive "the alleged need for immediate availability of attorneys" as sufficient justification for the total exclusion of nonresidents. *Id.* at 2613. Rejecting unavailability as a sufficient basis upon which to deny all nonresident attorneys admission to the district court bar, the Court specifically noted that "[a]s a practical matter, a high percentage of nonresident attorneys willing to take the state bar examination and pay the annual dues will reside in places 'reasonably convenient' to the District Court." *Id.* (quoting *Piper*, 470 U.S. at 286-87).

On similar grounds, the *Heebe* Court rejected the in-state office requirement. The Court, noting that this requirement was not also imposed on resident attorneys, concluded that it did nothing to further the articulated goals of the rule. Namely, the resident attorney with an out-of-state office is equally as unavailable for emergency court proceedings as the nonresident attorney whose office is also located out of the state. Nor was the rule's competency concern advanced by requiring nonresidents to maintain an office within the state. Finally, the Court stated that "there is no link between residency within a State and proximity to a courthouse." *Heebe*, 107 S. Ct. at 2613. Because the office requirement did not specify that "counsel *be* in the Eastern District," there was no assurance that the location of the office within the State would be easily accessible to the courthouse. *Id.* (original emphasis).

Although the reasoning of the Court in *Heebe* makes sense in the factual context of that case, it is inapposite here. First, in the instant appeal, the parties' dispute was disposed of on summary judgment, and therefore the record is devoid of relevant evidence tending to verify the central assertions of the Virgin Islands in support of its residency requirement. More important, it is necessary to first understand and distinguish those assertions from those that were considered by both the *Piper* and *Heebe* Courts. Unlike the assumptions rejected by the Court in *Piper* and *Heebe*, the issues raised in this appeal do not turn upon bald predictions of the willingness of nonresident attorneys to remain current and competent in local or federal law. Nor do they require us to assume that nonresident attorneys will be deliberately or otherwise unavailable for emergency court proceedings. Rather, directly in issue here is the very *ability* of even the most competent and otherwise available nonresident

attorney to secure travel accommodations or effective communication services to the Virgin Islands on short notice. As noted above, both the *Piper* and *Heebe* decisions considered relevant the expectation that nonresident attorneys would endeavor to live in a reasonably convenient location. Indeed, in the context of those cases, dealing with contiguous States, such an expectation is truly plausible. The assertion of the Bar Examiner in the instant appeal, however, is that, geographically, no such location exists, *see* Appellees' Brief at 4 (a nonresident attorney "who resides a short distance outside our boundaries would be a resident of the high seas"), and further, that, practically, no such location exists because of the inadequacy of travel and communication services between the Virgin Islands and the mainland.

It is particularly disheartening that distinguished federal judges in this Circuit blatantly write off as immaterial the transportation and communication problems that continue to plague the Virgin Islands, and that have haunted all of us -- including our Clerk's Office -- for years. As Chief Justice Taft once remarked: "All others can see and understand this. How can we properly shut our minds to it?" *Child Labor Tax Case (Bailey v. Drexel Furniture Co.)*, 259 U.S. 20, 37. (1921). It is not uncommon for us as judges to have mailed case files to the Virgin Islands two to three weeks in advance and learn that they still are not available when we arrive. Waiting for the connection of a phone call between the States and the Virgin Islands is often a true test of judicial patience. In effect, the majority disregards Justice Frankfurter's wise admonition that "there comes a point where this court should not be ignorant as judges of what we know as men [and women]." *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (Frankfurter, J., joined by Murphy and Rutledge, JJ.).

From the time that I first sat in the Virgin Islands as a visiting district judge in 1966 to my most recent sitting in 1987, I, and all other judges, have always meticulously planned plane schedules weeks in advance. We know that those who wait until the last minute can be left standing at the terminal gate, watching a loaded plane of vacationers depart. None of us dare to run that risk, and we should not, on this record, expect nonresident attorneys to have better fortunes in transportation and communication services. Although these comments may not relate to facts of which we may readily take judicial notice, I have yet to hear any dispute of my description of the travel and communications problems to and from the Virgin Islands. At a minimum, these are matters that should be decided on a fully litigated record after a hearing; they should not be given such short shrift in a judicial opinion. The terms "supervisory power" were never intended to be a synonym for raw judicial power exercised without regard to either rational judgments or an adequate factual record.

Unless we are to resolve the central factual issues raised by this appeal -- the ease and adequacy of travel and communications to and from the Virgin Islands -- I do not believe that we can justify invalidating Rule 56 as either unconstitutional under *Piper* or irrational or unnecessary pursuant to our supervisory powers under *Hebbe*. Thus, because I believe there exists a genuine issue of material fact, I would remand this case to the district court for a determination of the adequacy of travel and communication services. Indeed, one must not lose sight of the real interests at stake here. If the assertions of the Bar Examiner and the assumptions of the district court with regard to the quality of travel and communications services between the Virgin Islands and the continental United States are true, the complications envisioned by the district

court will jeopardize and even deprive the client of the nonresident attorney of substantial rights.[6] Thus, if these assertions were to be substantiated at trial, I would hold that the requirements under *Piper* have been met and that the residency requirement does not offend the privileges and immunities clause of article IV. Similarly, I would hold that, under *Heebe*, no basis exists upon which to exercise our supervisory powers to invalidate the residency requirement of Rule 56.

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6. In *Heebe* the Court recognized that "[a] client may have a number of excellent reasons to select a nonlocal lawyer: his or her regular lawyer most familiar with the legal issues may be nonlocal; a nonresident lawyer may practice a specialty not available locally; or a client may be involved in an unpopular cause with which local lawyers are reluctant to be associated." 107 S. Ct. at 2614 n.12. Absent evidence that such situations are widespread in the Virgin Islands, I am unwilling to invalidate the residency requirement as insubstantial, irrational or unnecessary. Nonresident attorneys are permitted to practice on a *pro hac vice* basis in the Virgin Islands. Although, accepting the district court's premise as true, these attorneys will face identical complications in making travel and communication arrangements, the disruption to the efficient administration of the Virgin Islands court system will be minimal as compared to the wholesale admission of nonresident attorneys who, unlike *pro hac vice* attorneys, bear the additional responsibility of representing indigent criminal defendants under Rule 16. *Cf. Piper*, 470 U.S. at 283 n.16 ("The nonresident who seeks to join a bar, unlike the *pro hac vice* applicant, must have the same professional and personal qualifications required of resident lawyers.").

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 206/1985

SUSAN ESPOSITO THORSTENN,

Plaintiff,

—v.—

GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally,

Defendant,

—and—

VIRGIN ISLANDS BAR ASSOCIATION,

Defendant/Intervenor,

Civil No. 207/1985

LLOYD DE VOS,

Plaintiff,

—v.—

GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally,

Defendant,

—and—

VIRGIN ISLANDS BAR ASSOCIATION,

Defendant/Intervenor.

JUDGMENT

The above captioned matters having come before the Court on the cross-motions of the parties for summary judgment, and the Court having considered the affidavits, stipulations of fact, and memoranda of law, of each of the parties, and having entered a written opinion of even date herewith now, therefore, in accordance with the aforementioned opinion of the Court, and being otherwise duly satisfied in the premises, it is hereby

ORDERED and ADJUDGED that the motion of defendant Geoffrey W. Barnard and intervenor Virgin Islands Bar Association be, and the same is hereby GRANTED,

FURTHER ORDERED and ADJUDGED, that the complaints in these consolidated actions be, and the same are, hereby DISMISSED ON THE MERITS.

DATED: December 8, 1986

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:
Orinn Arnold
Clerk of Court

By: /s/ FRANK BLACKMAN
Deputy Clerk

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
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Civil No. 206/1985

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Defendant,

—and—

VIRGIN ISLANDS BAR ASSOCIATION,

Defendant/Intervenor.

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MEMORANDUM OPINION

CHRISTIAN, Chief Judge

These consolidated actions for declaratory judgment and injunctive relief challenge the continued application of Rules 56 (b) (4) and (5) which require an applicant for admission to the Virgin Islands Bar Association to prove prior residency in the territory for a period of one year, and an intent to remain in the Virgin Islands, before the candidate will be allowed membership in the association. T. 5 App. V. R. 56(4) and (5).

The Virgin Islands Bar Association is an integrated bar association, and is comprised of all attorneys admitted to practice in this jurisdiction. T. 5 App. V. R. 54(a). With few exceptions, not relevant to this cause, attorneys who are not active members of the Virgin Islands Bar Association are barred from the prac-

tice of law in the territory.[1] Plaintiffs in these causes do not reside in the Virgin Islands and have no intention of relocating to this jurisdiction.[2] Under the rules which presently regulate admission to the bar association, plaintiffs are clearly ineligible for membership in the association.

In its present posture, this action is before the Court on cross motions of the parties for summary judgment. Plaintiffs contend that by its decision in *Supreme Court of New Hampshire v. Piper*, ____ US ____, 105 S. Ct. 1272 (1985), the Supreme Court of the United States held that the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution prohibits enforcement of any rule which makes residence in the jurisdiction a condition of admission to the bar.[3]

Defendant Geoffrey W. Barnard[4] and intervenor the Virgin Islands Bar Association[5] maintain that there is a substantial rea-

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1 An attorney who is currently in good standing as an active member of any bar of any state or territory of the United States or any foreign country, who has not suffered any disbarment or suspension of his license to practice in any jurisdiction, and who has been retained to represent a party involved in litigation filed in a court in the Virgin Islands may, in the discretion of the judge, on motion of an attorney of record, be admitted *pro hac vice* to participate in the litigation in the same manner as permitted an active member of the Virgin Islands Bar Association. T. 5 App. V. R. 51(f).

An inactive member of the Virgin Islands Bar Association, who is interested in litigation filed in a court of the Virgin Islands, may, in the court's discretion, be permitted to participate in the action as an active member of the Virgin Islands Bar Association. T. 5 App. V. R. 51(g).

2 Plaintiff Lloyd De Vos resides in New Jersey and Plaintiff Susan Esposito Thorstenn resides in New York. Each is a member in good standing of the New York and New Jersey Bar Associations. Both have taken and passed the Virgin Islands Bar Examination.

3 The constitutional rights guaranteed by the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution have been extended to the Virgin Islands by Section 3 of the Revised Organic Act, 48 USC § 1561 (1982).

4 Defendant Barnard has been made a party to this action solely in his capacity as Chairman of the Committee of Bar Examiners.

5 The Virgin Islands Bar Association joined defendant Barnard's motion for summary judgment and incorporated the arguments advanced by the

son for the claimed disparate treatment of nonresident candidates for bar admission, and that the discrimination practiced against those who do not reside in the territory bears a close relationship to that purpose. Under these circumstances, defendants argue, elimination of the residency requirement is not mandated.

A reading of *Piper* reveals that not all attempts to limit bar admissions to those who are inhabitants of the jurisdiction and intend to so remain residents are unconstitutional. The Supreme Court held in *Piper* that the opportunity to practice law is a fundamental right within the meaning of the Privileges and Immunities Clause. 105 S. Ct. at 1277. Consequently, the exclusion of nonresidents interferes with a protected privilege. *Id.* The foregoing conclusion, however, did not end the court's discussion of the matter.

The Supreme Court reasoned that "[l]ike many other constitutional provisions, the privileges and immunities clause is not absolute." *Piper*, 105 S. Ct. at 1278, *quoting Toomer v. Witsell*, 334 US 385, 396 (1948). Discrimination against nonresidents is not precluded where "there is a substantial reason for the difference in treatment" and when the degree of discrimination is substantially related to the governmental purpose. *Piper*, 105 S. Ct. at 1279, *citing*, *United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 US 208, 222 (1983).

The justifications advanced by the New Hampshire court for its refusal to admit nonresidents to the bar were that nonresident members would be less likely: (i) to become and remain familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do *pro bono* and other volunteer work in the State. *Piper*, 105 S. Ct. at 1279 (1985). The Supreme Court found there was no evidence to support the state's fears that nonresident attorneys would not perform their duties with the same degree of professional

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defendant in its own motion for summary judgment. Due to their identity of interest in this case, the aforementioned parties will hereinafter be referred to as defendants.

integrity as resident lawyers. Accordingly, the Court rejected New Hampshire's proffered justifications as insubstantial.

The question of admission to the Virgin Islands Bar Association, however, poses a situation which is factually distinct from that presented by *Piper*. The United States Court of Appeals for the Third Circuit analyzed the special circumstances surrounding the practice of law in the Virgin Islands in its opinion in *Aronson v. Ambrose*, 10 V.I. 613 (3rd Cir. 1973), *affirming* 9 V.I. 254 (DVI 1972), and expressed complete accord with the view that the reasons for excluding nonresidents from the practice of law were substantial. The Court noted,

> [t]he interest of . . . [the] territory in promoting the speedy and efficient administration of justice in its courts by assuring the competence and discipline of its bar is great and the actions of its legislature and courts toward these ends ought not to be interfered with except with the greatest caution and only if the measure in question is clearly constitutionally impermissible.

Aronson, 10 V.I. at 616.

As the Third Circuit observed in *Aronson*, the Virgin Islands are geographically isolated from the continental United States. Air travel is the only practical mode of transportation between the two. Passenger space aboard commercial airlines is limited and frequently unavailable absent reservations secured in advance. 10 V.I. 616-17.

The Court went on to state that,

> The case load of the district court is continually increasing and it would be intolerable if the court were compelled to depend, even in part, on lawyers a thousand miles away to answer urgent motion calls, attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants.

Id. at 617.

We are unpersuaded by plaintiffs argument that improvements in air services and other technological advances since the *Aronson* decision have made travel and communication to the Virgin Islands easy and accessible. The number of flights to Virgin Islands have increased since *Aronson*. The number of tourists traveling to the Virgin Islands, however, has likewise increased. Air travel on short notice remains difficult, if not impossible.

Telephone service is erratic and frequently connections between the mainland and the territory are unavailable. Equally undependable are the services which provide for the transport of materials and documents to and from the mainland.

Moreover, the ability of nonresident attorneys to keep up with developments in local law would also be substantially impaired by such counsel's absence from the jurisdiction. Unlike virtually all mainland jurisdictions, the publication of local opinion may be delayed for years. For example, the most recent publication of the Virgin Islands Reports, which was published in May of 1985, reports opinions rendered in 1983 and early 1984. More recent opinions are available only by review of the slip opinions which are maintained in the district court libraries. Publication of recent statutes and rules and regulations applicable to territorial administrative agencies are also delayed for long periods of time. Copies of current statutes and rules are unavailable except in the district court libraries.

As the Third Circuit correctly noted, the case load of the district court is ever increasing. The statistics issued by the Administrative Office of the United States Court for Federal Court Management, describing the year 1983, indicate that there were 481 pending cases per judgeship on the average in the United States district courts. This figure is compared to 781 pending cases per judgeship in the District Court of the Virgin Islands for the same year. This vast disparity places especially pressing responsibility upon the judges of this jurisdiction to efficiently manage their caseloads. Interruptions to accommodate delays occasioned by nonresident lawyers attempting to reach the islands, not to mention claimed conflicts respecting court appearances in the mainland jurisdictions in which they practice, cannot by countenanced.

Perhaps the most compelling reason for the retention of the residency requirement is the rule governing procedures for appointment of counsel in criminal cases. *See*, T. 5 App. V. R. 16. This rule requires the Clerk of the District Court to maintain a

list of the names of all attorneys admitted to practice in the Virgin Islands. Appointments are made, on a rotating basis, from the names on the aforementioned list.

All active members of the Virgin Islands Bar must be available for criminal appointments. Once appointed, each must accept the assignment. Moreover, none but the appointed attorney may appear on behalf of the criminal defendant. Counsel who declines a criminal assignment is totally barred from the practice of law in the district court. Such an attorney may not file papers or make an appearance on behalf of a client. The foregoing rules are admitting of no exception. T. 5 App. V. R 16.

It is the duty of the lawyer, once appointed to represent a defendant who is incarcerated, "to communicate with his client at his place of incarceration, as promptly as possible, but not later than five days from the date of the clerk's mailing of the order of appointment." T. 5 App. V. 16(B) (f). Often mail to the mainland takes longer than five days for delivery. Moreover, even if nonresident counsel received notice prior to the expiration of the period delimited by rule, accommodations for travel would be difficult to secure.

The requirements and obligations imposed by Rule 16 are made more critical by operation of the Speedy Trial Act, 18 USC § 3161 et seq. (1982). The Court must operate within the time constraints imposed by the act—or face the unacceptable consequences mandated by the statute. Thus far, operating with lawyers who reside in the territory, the Court has complied with the requirements of the Speedy Trial Act. Sometimes, however, the strict time constraints have barely been met and the mandatory sanctions narrowly escaped. Conformity will be virtually impossible upon admission of lawyers resident elsewhere.

Consideration of indigent criminal defendants forced to rely on nonresident attorneys is another factor in support of the residency requirement. Endless delays in court proceedings may cause serious financial difficulties for civil litigants. The burden on a criminal defendant, however, forced to endure delay because of his attorney's unavailability would cause even greater hardships.

In addition, there are ethical considerations which are served by the residency requirement. The territory does not employ full time staff to monitor and evaluate the ethical conduct of bar members. Service upon the Grievance and Ethics Committee of the Virgin Islands Bar Association is purely on a volunteer basis by members. There are no funds to investigate the conduct of lawyers who reside and practice in distant states. The ability of the courts and the bar to monitor and insure the ethical conduct of bar members would be significantly undermined by the admission of lawyers who do not reside in the territory.

For the foregoing reasons we conclude that the reasons set forth by the defendants as justifications for the residency requirement are substantial.

Moreover, the discrimination practiced against nonresidents, if indeed such be the case, is the least restrictive means of preventing the harm which would be caused by the admission of nonresident attorneys to the bar. It is a common occurrence, far too often the case, that persons who migrate to the Virgin Islands from the continental United States, fully intending to remain and make the Virgin Islands their place of permanent abode, depart these shores after a stay of a few months. The reason for this are many fold. For some, the tropical climate proves intolerable. Others cannot long cope with island living, given the may inconveniences and deprivations connected therewith. The extremely high cost of living exacts its own adverse influence. The overall educational system is considered by some as a serious drawback. Consequently, it is only after one has resided in this jurisdiction for at least one full year that there exists the reasonable assurance of the avowed, good faith, intention that applying attorney intends to, and will, reside in the Virgin Islands. The one year residency requirement provides the best circumstantial guarantee of an applicant's resolution to remain in the territory. Accordingly, we do not find the rules at issue in this cause to be "clearly constitutionally impermissible." *See Aronson*, 10 V.I. at 616. The requirements of one year prior residency and proof of an intent to remain in the Virgin Islands will, therefore, remain in full force and effect.

DATED: December 8, 1986

JUDICIAL BRANCH

Revised Organic Act of the Virgin Islands of 1954 § 21, 48 U.S.C. § 1611 (1982)

District Court of the Virgin Islands; local courts; jurisdiction; practice and procedure

(a) The judicial power of the Virgin Islands shall be vested in a court of record designated the "District Court of the Virgin Islands" established by Congress, and in such appellate court and lower local courts as may have been or may hereafter be established by local law.

(b) The legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by section 22(a) and (c) of this Act.

(c) The rules governing the practice and procedure of the courts established by local law and those prescribing the qualifications and duties of the judges and officers thereof, oaths and bonds, and the times and places of holding court shall be governed by local law or the rules promulgated by those courts.

Revised Organic Act of the Virgin Islands of 1954 § 22, 48 U.S.C. § 1612 (1982)

Jurisdiction of District Court

(a) The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of Title 28, United States Code, and that of a bankruptcy court of the United States. The District Court of the Virgin Islands shall have exclusive jurisdiction over all criminal and civil proceedings in the Virgin Islands with respect to the income tax laws applicable to the Virgin Islands, regardless of the degree of the offense or of the amount involved, except the ancillary laws relating to the income tax enacted by the legislature

of the Virgin Islands. Any act or failure to act with respect to the income tax laws applicable to the Virgin Islands which would constitute a criminal offense described in chapter 75 of subtitle F of the Internal Revenue Code of 1954 shall constitute an offense against the government of the Virgin Islands and may be prosecuted in the name of the government of the Virgin Islands by the appropriate officers thereof in the District Court of the Virgin Islands without the request or the consent of the United States attorney for the Virgin Islands, notwithstanding the provisions of section 27 of this Act.

(b) In addition to the jurisdiction described in subsection (a) of this section the District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands: *Provided*, That the jurisdiction of the District Court of the Virgin Islands under this subsection shall not extend to civil actions wherein the matter in controversy does not exceed the sum or value of $500, exclusive of interest and costs; to criminal cases wherein the maximum punishment which may be imposed does not exceed a fine of $100 or imprisonment for six months, or both; and to violations of local police and executive regulations. The courts established by local law shall have jurisdiction over the civil actions, criminal cases, and violations set forth in the preceding proviso. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by local law for the purposes of determining the availability of indictment by grand jury or trial by jury.

(c) The District Court of the Virgin Islands shall have concurrent jurisdiction with the courts of the Virgin Islands established by local law over those offenses against the criminal laws of the Virgin Islands, whether felonies or misdemeanors or both, which are of the same or similar character or part of, or based on, the same act or transaction or two or more acts or transactions connected together or constituting part of a common scheme or plan, if such act or transaction or acts or transactions also constitutes or constitute an offense or offenses against one or more of the statutes over which the District

Court of the Virgin Islands has jurisdiction pursuant to subsections (a) and (b) of this section.

Revised Organic Act of the Virgin Islands of 1954 § 23, 48 U.S.C. 1613 (1982)

Relations between courts of United States and Courts of Virgin Islands; review by United States Court of Appeals for the Third Circuit; reports to Congress; rules

The relations between the courts established by the Constitution or laws of the United States and the courts established by local law with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings: *Provided,* That for the first fifteen years following the establishment of the appellate court authorized by section 21(a) of this Act, the United States Courts of Appeals for the Third Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of the Virgin Islands from which a decision could be had. The Judicial Council of the Third Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions. The United States Court of Appeals for the Third Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this section.

Revised Organic Act of the Virgin Islands of 1954 § 23A, 48 U.S.C. § 1613a (1982)

Appellate jurisdiction of District Court; procedure; review by United States Court of Appeals for the Third Circuit; rules; appeals to Appellate Court

(a) Prior to the establishment of the appellate court authorized by section 21(a) of this Act, the District Court of the Virgin Islands shall have such appellate jurisdiction over the courts of the Virgin Islands established by local law to the extent now or hereafter prescribed by local law: *Provided*, That the legislature may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States, including this Act, or any authority exercised thereunder by an officer or agency of the Government of the United States, or the conformity of any law enacted by the legislature of the Virgin Islands or of any order or regulation issued or action taken by the executive branch of the government of the Virgin Islands with the Constitution, treaties, or laws of the United States, including this act, or any authority exercised thereunder by an officer or agency of the United States.

(b) Appeals to the District Court of the Virgin Islands shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The chief judge of the district court shall be the presiding judge of the appellate division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the appellate division at any session shall be designated by the presiding judge from among the judges who are serving on, or are assigned to, the district court from time to time pursuant to section 24(a) of this Act: *Provided*, That no more than one of them may be a judge of a court established by local law. The concurrence of two judges shall be necessary to any decision by the appellate division of the district court on the merits of an appeal, but the presiding judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take or

prosecute it in accordance with the applicable law or rules of procedure. Appeals pending in the district court on the effective date of this Act shall be heard and determined by a single judge.

(c) The United States Court of Appeals for the Third Circuit shall have jurisdiction of appeals from all final decisions of the district court on appeal from the courts established by local law. The United States Court of Appeals for the Third Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

(d) Upon the establishment of the appellate court provided for in section 21(a) of this Act all appeals from the decisions of the courts of the Virgin Islands established by local law not previously taken must be taken to that appellate court. The establishment of the appellate court shall not result in the loss of jurisdiction of the district court over any appeal then pending in it. The rulings of the district court on such appeals may be reviewed in the United States Court of Appeals for the Third Circuit and in the Supreme Court notwithstanding the establishment of the appellate court.

Revised Organic Act of the Virgin Islands of 1954 § 24, U.S.C. § 1614 (1982)

Judges of the District Court

(a) The President shall, by and with the advice and consent of the Senate, appoint two judges for the District Court of the Virgin Islands, who shall hold office for terms of 10 years and until their successors are chosen and qualified, unless sooner removed by the President for cause. [The judge of the district court who is senior in continuous service and who otherwise qualifies under section 136(a) of title 28, United States Code, shall be the chief judge of the court.] The salary of a judge of the district court shall be at the rate prescribed for judges of the United States district courts. Whenever it is made to appear that such an assignment is necessary for the proper dispatch of the business of the district court, the chief judge of the Third Judicial Circuit of the United States may assign a judge of a court of record of the Virgin Islands established by local law, or a circuit

or district judge of the Third Judicial Circuit, or a recalled senior judge of the District Court of the Virgin Islands, or the Chief Justice of the United States may assign any other United States circuit or district judge with the consent of the judge so assigned and of the chief judge of his circuit, to serve temporarily as a judge of the District Court of the Virgin Islands. The compensation of the judges of the district court and the administrative expenses of the court shall be paid from appropriations made for the judiciary of the United States.

(b) Where appropriate, the provisions of part II of title 18 and of title 28, United States Code, and, notwithstanding the provisions of rule 7(a) and of rule 54(a) of the Federal Rules of Criminal Procedure relating to the requirement of indictment and to the prosecution of criminal offenses in the Virgin Islands by information, respectively, the rules of practice heretofore or hereafter promulgated and made effective by the Congress or the Supreme Court of the United States pursuant to titles 11, 18, and 28, United States Code, shall apply to the district court and appeals therefrom: *Provided*, That the terms "Attorney for the government" and "United States attorney" as used in the Federal Rules of Criminal Procedure, shall, when applicable to causes arising under the income tax laws applicable to the Virgin Islands, mean the Attorney General of the Virgin Islands or such other person or persons as may be authorized by the laws of the Virgin Islands to act therein: *Provided further*, That in the district court all criminal prosecutions under the laws of the United States, under local law under section 22(c) of this Act, and under the income tax laws applicable to the Virgin Islands may be had by indictment by grand jury or by information: *Provided further*, That an offense which has been investigated by or presented to a grand jury may be prosecuted by information only by leave of court or with the consent of the defendant. All criminal prosecutions arising under local law which are tried in the district court pursuant to section 22(b) of this Act shall continue to be had by information, except such as may be required by the local law to be prosecuted by indictment by grand jury.

§ 25. Revised Organic Act of the Virgin Islands of 1954 § 25, 48 U.S.C. § 1615 (1982)

Judicial Divisions; places for holding court

The Virgin Islands consists of two judicial divisions; the Division of Saint Croix, comprising the island of Saint Croix and adjacent islands and cays, and the Division of Saint Thomas and Saint John, comprising the islands of Saint Thomas and Saint John and adjacent islands and cays. Court for the Division of Saint Croix shall be held in Christiansted, and for the Division of Saint Thomas and Saint John at Charlotte Amalie.

§ 27. Revised Organic Act of the Virgin Islands of 1954 § 27, 48 U.S.C. § 1617 (1982)

United States attorney; appointments; duties

The President shall, by and with the advice and consent of the Senate, appoint a United States attorney for the Virgin Islands to whose office the provisions of chapter 35 of Title 28, United States Code, shall apply. Except as otherwise provided by law it shall be the duty of the United States attorney to prosecute all offenses against the United States and to conduct all legal proceedings, civil and criminal, to which the Government of the United States is a party in the district court and in the courts established by local law. He shall also prosecute in the district court in the name of the government of the Virgin Islands all offenses against the laws of the Virgin Islands which are cognizable by that court unless, at his request or with his consent, the prosecution of any such case is conducted by the attorney general of the Virgin Islands. The United States attorney may, when requested by the Governor or the attorney general of the Virgin Islands, conduct any other legal proceedings to which the government of the Virgin Islands is a party in the district court or the courts established by local law.

Rules of the District Court of the Virgin Islands

V.I. Code Ann. tit. 5, App. V Rule 16

B. APPOINTMENT OF COUNSEL

(a) In every criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense as defined in 18 U.S.C. § 1(3)) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation and appears without counsel, the court shall advise the defendant that he has the right to be represented by counsel at every stage of the proceedings and that counsel will be appointed to represent him if he is financially unable to obtain counsel. The defendant shall be further informed of the provisions of Rule 5 of the Federal Rules of Criminal Procedure.

(b) In the event that the defendant expresses a desire to waive his right to counsel, the court shall present to him a written waiver of right to the appointment of counsel. If the defendant executes such waiver, it shall be filed in the record of proceedings, or, if in the territorial court, it shall be transmitted to the clerk of the district court and the fact of waiver shall be noted in the record. If the defendant waives his right to counsel, but refuses to execute such waiver, the judge shall note the fact in the record of the proceedings. If the defendant admits, or the court finds after appropriate inquiry, that the defendant is financially able to obtain counsel, but declines to do so, the court shall certify that fact in the record of the proceedings.

(c) If the defendant does not waive representation by counsel, it shall be the duty of the court to make an appropriate inquiry and findings as to the defendant's financial ability to employ counsel of his own choice. Statements by the defendant in such inquiry shall be made under oath and supported by affidavits sworn to before the court. Such affidavits shall be the standard form supplied by the Administrative Office of the United States Courts. The test for the appointment of counsel is not indigency; it is the financial inability of the defendant to se-

cure competent representation and to obtain an adequate defense.

(d) If on the basis of such inquiry the court finds that the defendant is financially unable to obtain counsel, the court shall immediately direct his attention to the question of bail, adjourn the remainder of the proceedings forthwith and appoint counsel from the lists of attorneys as soon thereafter as is reasonably possible and as heretofore provided.

(e) It shall be the duty of any defendant released on bail and for whom counsel is appointed to report to such appointed counsel at his office as promptly as possible and not later than five days from the date of the clerk's mailing of the appointment.

(f) It shall be the duty of any attorney who is appointed to represent a defendant incarcerated at the time of his appointment to communicate with the defendant at his place of incarceration as promptly as possible, and not later than five days from the date of the clerk's mailing of the order of appointment.

(g) No such defendant shall select his own counsel from the panel of attorneys or otherwise. The selection of counsel shall be within the exclusive province and discretion of the court.

(h) The court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(i) If at any time in the proceedings an attorney who has been appointed feels that he cannot adequately represent the defendant, he shall make such representations to the court and the court may then relieve such attorney of the appointment and appoint substitute counsel to represent the defendant.

(j) The court may, in the interests of justice, substitute one or more appointed counsel for another at any stage of the proceedings before it.

(k) No counsel appointed hereunder shall seek or accept any fee from a defendant for whom he is appointed. If there should come to the knowledge of such counsel any information indicating that the defendant can make payment in whole or in part for legal or other services, provided for under this plan, then it shall be his duty to report such information promptly to the court, so that appropriate action may be taken in regard thereto.

(l) If at any time after the appointment of counsel, the court finds that the defendant is financially able to obtain counsel, or make partial payment for his representation, the court may terminate the appointment of counsel, or direct that payment by defendant be made as provided in 18 U.S.C. 3006A(f).

(m) If at any stage of the proceedings the court shall find that the defendant for whom counsel has not previously been appointed under this plan is financially unable to pay counsel whom he has retained, the court may appoint counsel in the same manner as hereinabove provided. Such appointment, if made from the panel of attorneys approved by the court, may be made retroactive to include any representation furnished pursuant to the plan prior to appointment.

(n) Any person subject to revocation of parole, in custody as a material witness, or seeking relief under 28 U.S.C. 2241, 2254, or 2255 of Title 28 or 18 U.S.C. 4245 may apply to the court to be furnished representation based on a showing (1) that the interests of justice so require and (2) that such person is financially unable to obtain representation. Such application shall be verified and in such written form as is prescribed by the Judicial Conference of the United States. If the party applicant is not before the court, the court may, without requiring the personal appearance of the party for such purpose, act on the basis of the form alone, or the form as supplemented by such information as may be made available by an officer or custodian or other responsible officer, provided that such information is also made available to the party. The court may approve such representation on a determination that the interests of justice so require and that such person is financially unable to obtain representation.

(o) Any person for whom counsel is appointed shall be represented in all proceedings before the court. If requested to do so

by the party whom he represents, counsel appointed under this plan shall file a timely notice of appeal, and his appointment shall continue on appeal unless, or until he is relieved by an appropriate order of the United States Court of Appeals for the Third Circuit.

V.I. Code Ann. tit. 5, App. V Rule 56

Rule 56. Admission to the Bar

(b) Each applicant for examination under the preceding section must file an application with the Committee of Bar Examiners at least thirty days prior to the date prescribed for annual examination as above, in which he must allege and prove to the satisfaction of the committee that:

1. He is over the age of twenty-one;

2. He is a citizen of the United States or a resident alien, i.e., an alien who has lawfully been admitted for permanent residence in the United States;

3. He is a person of good moral character;

4. He shall have resided in the Virgin Islands for at least one year immediately preceding his proposed admission to the Virgin Islands Bar; and

5. If admitted to practice, he intends to continue to reside in and to practice law in the Virgin Islands;

6. Before commencing his law school training he had successfully completed two years of study in a college or university, or the equivalent of such study; and

7. He is the graduate of an accredited law school approved by the American Bar Association.

OPPOSITION

BRIEF

(2)

No. 87-1939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GEOFFREY W. BARNARD, as Chairman of the Committee of Bar Examiners of the Virgin Islands,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN and LLOYD DeVOS
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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8 pp

QUESTION PRESENTED*

Did the court of appeals correctly follow *Frazier v. Heebe*, 107 S. Ct. 2607 (1987), in striking down a district court rule which requires that lawyers must reside in the Virgin Islands in order to practice law there?

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*Other parties which appeared below include the Virgin Islands Bar Association, which intervened as a defendant in the district court, and the Government of the Virgin Islands, which filed a brief as *amicus curiae* in support of petitioner in the court of appeals.

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1939

GEOFFREY W. BARNARD, as Chairman of the Committee of Bar Examiners of the Virgin Islands,
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SUSAN ESPOSITO THORSTENN and LLOYD DeVOS
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Susan Esposito Thorstenn and Lloyd DeVos respectfully ask the Court to deny the petition for a writ of certiorari for the reasons set forth below.

STATEMENT OF FACTS

At issue here is a rule of the District Court of the Virgin Islands which requires members of that court's bar to reside in the Islands for one year before their admission and to intend to reside there afterwards. 5 V.I. Code, App. V, Rule 56(b)(4), (5) (Pet. App. 78a). The District Court of the Virgin Islands is a federal trial court; it also shares jurisdiction with the territorial courts over some civil and criminal matters and has appellate jurisdiction over cases tried in the territorial

courts (Pet. App. 68a, 73a). It is the only court which licenses lawyers in the Islands, and thus lawyers who are excluded from its bar cannot practice law in any manner there.

Respondent Thorstenn lives in New York, and respondent DeVos lives in New Jersey. Both are members in good standing of the New York and New Jersey bars. Both took and passed the Virgin Islands bar examination, but were denied admission to the bar solely because of the local rule at issue here (Pet. App. 3a-4a). They filed this suit in the District Court of the Virgin Islands, alleging that the residence requirements violated the Privileges and Immunities Clause, which Congress applied to the Virgin Islands in the Revised Organic Act, 48 U.S.C. § 1561.

Both sides moved for summary judgment, and the district court upheld the rule, citing a number of "special circumstances surrounding the practice of law in the Virgin Islands," primarily relating to the Islands' geographic isolation from the mainland, which were said to distinguish this case from *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), in which a similar state court rule was held unconstitutional (Pet. App. 64a).

A divided panel of the Third Circuit struck down this rule in an exercise of the court's supervisory authority, relying on the intervening decision in *Frazier v. Heebe*, 107 S. Ct. 2607 (1987)(Pet. App. 35a-57a). The case was reheard *en banc*, and the full court, by an eight to five margin, agreed with the panel that the rule was invalid under *Frazier*. The majority opinion stated that the reasons given for these restrictions "are essentially the same as those rejected for lack of inherent merit in *Frazier*," that less restrictive alternatives would achieve the district court's goals, and that "*Frazier* must be viewed as generally applicable to the United States district courts" (Pet. App. 7a, 8a). The dissenting opinion argued that

the Islands' isolation made this case different from *Frazier* and that, at a minimum, a trial was needed to sort out the parties' disagreements about the adequacy of air service and the telephone system linking the Virgin Islands to the mainland (Pet. App. 10a-34a).

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because the decision below is consistent with, if not compelled by this Court's rulings in *Piper* and *Frazier*. In addition, the issue is not of sufficient importance to merit review by this Court, and the factual distinctions which petitioner attempts to draw between those cases and this one only underscore the reasons why review is unwarranted.

In essence, petitioner is arguing that the Virgin Islands are unique and that their geographic isolation provides a reason for crediting arguments about non-resident lawyers which the Court rejected in *Piper* and *Frazier*. But if conditions in the Virgin Islands really are unique (a point respondents in no way concede), then a ruling by this Court will be of limited precedential value, a factor which counsels against granting review.

Moreover, nothing in *Piper* or *Frazier* supports petitioner's core premise that the site of a lawyer's residence assures his or her competence, ethics, willingness to handle matters *pro bono*, and availability for court hearings. The only concession which *Piper* made to concerns about a lawyer's "great distance" from a state was the observation that such lawyers may be required to affiliate with local counsel in specific cases. 470 U.S. at 287. Neither *Piper* nor *Frazier* suggested that a lawyer's "great distance" from a jurisdiction is a proper basis for denying that lawyer a license to practice law altogether.

Petitioner also challenges the Third Circuit's use of its supervisory power to invalidate the local rule, stating (at 9) that Congress in the Revised Organic Act delegated broad rulemaking authority to the District Court of the Virgin Islands, which is said to be "distinct from other lower federal courts." But that Act also makes it clear that this rulemaking power must be exercised in conformity with the Privileges and Immunities Clause, which applies "with the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561. This fact is important for two reasons.

First, it shows that Congress has decided to subject Virgin Islands laws to the same level of scrutiny as state or federal laws, a judgment which is well within Congress's power to make under U.S. Const. Art. IV, § 3. *See Mullaney v. Anderson*, 342 U.S. 415, 419-20 (1952). Second, it demonstrates that petitioner's argument about the Third Circuit's use of its supervisory authority is beside the point, for if that court had not decided the case in this manner, it would have been obliged to decide the case on constitutional grounds, in which event the local rule would fall under *Piper*. That Congress has addressed this issue and that this rule is invalid under either *Piper* or *Frazier* provide additional reasons for denying review here.

Finally, we note that petitioner made the very arguments it advances here before the Third Circuit Court of Appeals, a court which sits in the Virgin Islands twice a year and is thus very familiar with conditions there. That the Third Circuit was unwilling to credit petitioner's principal claim (or even to order a trial at which the allegedly unique facts could be more fully developed) further underscores the absence of a need for review by this Court. In sum, this is a unique case, decided by an *en banc* court of appeals with special knowledge of the

potential impact of its decision. The petition presents no reason for this Court to review that decision other than petitioner's disappointment with the result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JOINT

APPENDIX

(8) (6)

Nos. 87-1939 and 87-2008

In The

Supreme Court of the United States

October Term, 1987

GEOFFREY W. BARNARD, AS CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN *et al.*,
Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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Certiorari granted June 30, 1988

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RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket No. 87-3035

FILINGS—PROCEEDINGS

DATE		
1987		
Jan.	16	Order (Chief Deputy Clerk) consolidating appeals for purposes of briefing and disposition on the merits, filed. (Cov. 87-3034/35) (mmd)
		SEE DOCKET SHEET NO. 87-3034 FOR COMPLETE DOCKET ENTRIES
Nov.	2	Motion by appellees for permission to file the petition for rehg. o/t w/serv. filed (cvs. 87-3034/5) (sa)
Nov.	3	Order (Clerk) granting above mot. with filing as of the date of this order filed (cvs. 87-3034/5)(sa)
Nov.	9	Order (Gibbons, Chief Judge, Seitz, Weis, Higginbotham Sloviter Becker Stapleton, Mansmann Greenberg Scirica Hutchinson & Roseen Cir. Judges) Ordering that the Clerk of this Ct. vacate the panel's opinion and judgment entered September 30, 1987 & list the case for rehg. before the Ct. In Banc at the convenience of the Ct. (cvs. 87-3034/5) filed sa
Dec.	16	At reargument in banc Ch.J. Gibbons directed cnsl. to have a transcript made from the tape of oral argmt. (Cvs. 87-3034/35) (ab)
1988		
Jan.	29	Transcript of hearing in banc rec'd for info of Ct. (Cvs. 87-3034/35) (as)
Feb.	8	Corrections to transcript received from Hodge, counsel for appee. Forwarded to Court. (Cvs. 87-3034/35)(as)

Mar. 31 Opinion on rehearing (Gibbons, Chief Judge, *Seitz,* Weis, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowan and Rosenn, Cir. Judges) filed. w/dissent by Higginbotham with whom Weis Greenberg Hutchinson and Scirica Cir. Judges join. (cvs. 87-3034/5) sa

Mar. 31 Judgment reversing and remanding to DC w/ instruction to enter summary judgments in favor of the plaintiffs. Csts txd agnst the appellees. (cvs. 87-3034/5) sa

Apr. 20 Mot. by Geoffrey W. Barnard Appellee to stay mandate to & including 5-23-88 w/serv. filed (cvs. 87-3034/5)sa

Apr. 19 Mot. by VI Bar association to stay the mandate to and including 5-23-88 w/serv. filed (cvs. 87-3034/5) sa

Apr. 25 Appellants' opposition to the mot. to stay the mandate pending application for certiorari (cvs. 87-3034/5) filed sa

Apr. 29 Order (Seitz, Cir. Judge) Staying the mandate to and including 5-23-88 (Geoffrey W. Barnard) filed (cvs. 87-3034/5) sa

Apr. 29 Order (Seitz, Cir. Judge) staying the mandate and including 5-23-88 (Virgin Islands Bar Association) filed (cvs. 87-3034/5) sa

May 5 Memorandum in reply to appellant's opposition to mot. to stay mandate Pending application for cert. w/serv. Rec'd (cvs. 87-3034/5) sa

May 18 Letter dated 5-11-88 frm. R. Eric Moore, Esq., withdrawing appearance of Diane Trace Warlick as counsel for the Virgin Islands Bar Association (cvs. 87-3034/5) filed sa

May 19 Mot. by appellee, Geoffrey Barnard to further stay the mandate to & incldg. 6-33-88 w/serv. fld. (cv. 87-3034/5) sa

May 23 Appellants' opposition to mot. for further stay of mandate w/serv. filed cvs. 87-3034/5) sa

May 24 Order (Seitz Cir. Judge) Further staying the issuance of the mandate to & including 6-3-88 filed (cvs. 87-3034/5) sa

May 27 Letter dated 5-24-88 from Maria Tankenson Hodge Esq. stating that appellee, Geoffrey Barnard fld. a pet. for cert. to the SC on 5-23-88 w/serv. Rec'd for the info. of the Ct. (cvs. 87-3034/5) sa

May 31 Mot. by VI Bar Assn. requesting that the law firm of Hunter, Colianni, Cole & Turner be substituted as counsel for the VI Bar Assn. in the place of the Law Offices of Eric Moore w/serv. (cvs. 87-3034/5) fld (sa)

June 13 Notice of Filing pet. for certiorari from the Clerk of the Supreme Court at SC No. 87-2008 on 6-8-88 filed (cvs. 87-3034/5) sa

July 5 Order from the Clerk of SC dated 6-30-88 Sc No. 87-2008 granting cert. The case is consolidated w/87-1939 *Geoffrey W. Barnard,* etc. v. ***Susan Esposito Thorstenn, et al.*** and total of one hour is allotted for oral argument. (cvs. 87-3034/5) filed sa

July 5 Order from the Clerk of SC dated 6-30-88 SC No. 87-1939 granting cert. The case is consolidated w/87-2008 ***Virgin Islands Bar Association v. Susan Esposito Thorstenn, et al.*** and a total of one hour is allocated for oral argument filed (cvs. 87-3034/5) sa

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket No. 87-3034

FILINGS—PROCEEDINGS

DATE 1987		
Jan.	16	Order (Chief Deputy Clerk) consolidating appeals for purposes of briefing and disposition on the merits, filed. (Cov. 87-3034/35) (mmd)
Feb.	4	Motion by aplts to expedite appeal, *and* letter dated 2-5-87 w/following proposed bing. schedule: Aplts' B&A to be filed 2-20-87, Aplee's brief to be filed 3-17-87, Aplt's RB, if any, to be filed 3-25-87, Hear Oral argument in V.I. St. Croix, during week of 4-27-87, *or* alternatively, argument in Phila., filed. (ad)
Feb.	11	Memorandum by aplees in opposition to aplts' mot. to expedite appeal, *with* enclosures, filed. (ad)
Mar.	3	Order (*Seitz,* Higginbotham & Sloviter, CJ) motion to expedite appeal denied, in view of denial parties shall notify Ct. whether they desire to have the matter listed for disposition in Philadelphia or V.I., filed. (ms) (cvs. 87-3034/5)
Mar.	16	Let dtd 3-11-87 from aplee requesting to have appeal listed in V.I., rec'd for Ct's information. (ms) (cvs 87-3034/5)
Mar.	18	Motion by aplts to have appeal heard in Phila., filed. (ms) (cvs 87-3034/5)
Mar.	24	Order (*Seitz,* Higginbotham & Rosenn, CJ) ORDERED that the above captioned matters be listed for disposition in V.I. during week of 4-27-87, filed. (ms) (cvs 87-3034/5)
Mar.	28	Notice of appelle/intervenor, VI Bar Association's joinder in the brief of appellee, Barnard, filed. (mgp) (Cvs. 87-3034/5)

Apr.	20	Motion by aplts to supplement apx, filed. (ms) cvs 87-3034/5)
Apr.	29	Order (*Seitz,* Higginbotham & Rosenn, CJ) ORDERED that motion to sup. apx is granted, filed. (ms) (cvs 87-3034/35)
June	26	Clerk's letter to counsel addressing the following: 1) Does this Ct have supervisory power over D.C. of VI? 2) If yes, is *Frazier v. Heebe, et al.* controlling re residency requirement? Applts' brief should be filed on or before 7/26/87 and appees' brief should be filed on or before 8/26/87. A reply brief may be filed on or before 9/8/87. (Cvs. 87-3034/5) (as)
Sept.	1	Notice of aplee/intervenor, V.I. Bar Assoc., joinder in sup. brief of aplee, filed. (ms) (cvs 87-3034/5)
Sept.	3	Let dtd 8-31-87 from aplt rec'd for Ct's info. (ms) (cvs 87-3034/5)
Nov.	2	Motion by appellees for permission to file the petition for rehg. o/t w/serv. filed (cvs. 87-3034/5) (sa)
Nov.	3	Order (Clerk) granting above motion w/filing as of the date of this order. filed (cvs. 87-3034/5) (sa)
Nov.	9	Order (Gibbons, Chief Judge, Seitz, *Weis,* Higginbotham Sloviter Becker Stapleton, Mansmann Greenberg Scirica Hutchinson and Rosenn, Cir. Judges) Ordering that the Clerk of this Court vacate the panel's opinion and judgment entered September 30, 1987 & list the case for rehg. before the Ct. In Banc at the convenience of the Ct. (cvs 87-3034/5) filed sa
Dec.	16	At reargument in banc Ch.J. Gibbons directed cnsl to have a transcript made from the tape of oral argmt. (Cvs. 87-3034/35) (ab)

1988

Jan. 29 Transcript of rehearing in banc rec'd for info of Ct. (Cvs. 87-3034/35) (as)

Feb. 8 Corrections to transcript received from Hodge, counsel for apee. Forwarded to Court (as) (cvs. 87-3034/35)

Mar. 31 Opinion on rehearing (Gibbons, Chief Judge, *Seitz,* Weis, Higginbotham, Sloviter, Becker Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen and Rosenn, Cir. Judges) filed. w/dissent by Higginbotham with whom Weis Greenberg Hutchinson and Scirica Cir. Judges join. (cvs. 87-3034/5) sa

Mar. 31 Judgment reversing and remanding to DC w/ instruction to enter summary judgments in favor of the plaintiffs. Csts. txd agnst the appellees. (cvs. 87-3034/55) sa

Apr. 20 Mot. by Geoffrey W. Barnard, Appellee to stay mandate to & including 5-23-88 w/serv. filed (cvs. 87-3034/5) sa

Apr. 19 Mot. by VI Bar Association to stay the mandate to & including 5-23-88 w/serv. filed (cvs. 87-3034/5) sa

1988

Apr. 25 Appellants' opposition to the motions to stay the mandate pending application for certiorari. (cvs. 87-3034/5) filed sa

Apr. 29 Order (Seitz, Cir. Judge) staying the mandate to & including 5-23-88 (Geoffrey W. Barnard) filed (cvs. 87-3034/5) sa

Apr. 29 Order (Seitz, Cir. Judge) staying the mandate to & including 5-23-88 (Virgin Islands Bar Association) filed (cvs. 87-3034/5) sa

May 5 Memorandum in reply to appellant's opposition to mot to stay mandate pending application for cert. w/serv. Rec'd (cvs. 87-3034/5) sa

May 18 Letter dated 5-11-88 from R. Eric Moore, Esq. withdrawing appearance of Diane Trace Warlick as counsel for the Virgin Islands Bar Association (cvs. 87-3034/5) filed sa

May 19 Mot. by appellee, Geoffrey Barnard to further stay the mandate to & incldg. 6-3-88 w/ serv. filed (cvs. 87-3034/5) sa

May 23 Appellants' opposition to mot. for further stay of mandate w/serv. fld. (cvs. 87-3034/5) sa

May 24 Order (Seitz Cir. Judge) further staying the issuance of the mandate to and 6-3-88 filed (cvs. 87-3034/5) sa

May 27 Letter dated 5-24-88 from Maria Tankenson Hodge, Esq. stating that appellee, Geoffrey Barnard filed a petition for writ of cert to the SC on 5-23-88 w/serv. Rec'd for the information of the Ct. (sa) (cvs. 87-3034/5)

May 31 Mot. by VI Bar Assn. requesting that the law firm of Hunter, Colianni, Cole & Turner be substituted as counsel for the VI Bar Assn. in the place of the Law Offices of Eric Moore w/serv. (cvs. 87-3034/5) filed (sa)

June 13 Notice of Filing petition for certiorari from the Clerk of SC at Sc. # 87-2008 on 6-8-88 filed (cvs. 87-3034/5) sa

July 5 Order from the Clerk of SC dated 6-30-88 Sc No. 87-2008 granting cert. The case is consolidated w/87-1939 *Geoffrey W. Barnard,* etc. v. *Susan Esposito Thorsternn, et al.* and total of one hour is allotted for oral argument. (cvs. 87-3034/5) filed sa

July 5 Order from the Clerk of SC dated 6-30-88 SC No. 87-1939 granting cert. The case is consolidated w/ 87-2008 *Virgin Islands Bar Association v. Susan Esposito Thorstenn, et al.* and total of one hour is allotted for oral argument filed (cvs. 87-3034/5) sa

RELEVANT DOCKET ENTRIES

DISTRICT COURT OF THE VIRGIN ISLANDS

Civil No. 85-206

PROCEEDINGS

DATE		
1985		
June	1	COMPLAINT. cf
June	17	MEMORANDUM of law in support of action for injunction and relief. cf
June	17	AFFIDAVIT. in support of injunction and declaratory relief. cf
June	21	ORDER (ALC) that pltf. may sit the V.I. Bar exam for 7/31 and 8/1/85. cf
July	11	SUMMONS issued to Geoffrey W. Barnard executed on 7/11/85. cf
1986		
Feb.	10	MOTION for enlargement of time by deft. cf
Feb.	18	ORDER (ALC) that the time for deft. to resp. to pltfs. complt. is enlarged.
Feb.	18	CERTIFICATE OF service by deft. cf
Mar.	12	ANSWER by deft. cf
Mar.	31	STIPULATION of facts. cf
April	1	MOTION for summary judgment by pltfs. cf
April	1	MEMORANDUM of law in support of pltfs. mot. for summary judgment. cf
April	2	AFFIDAVIT of Susan Esposito. cf

April	2	CERTIFICATE of service. cf
June	3	CROSS-MOTION for summary judgment by defts. cf
June	3	MEMORANDUM of law in support of defts. mot. for summ. judg. and in opp. to plaintfs. mot. for summary judgment. cf
June	3	AFFIDAVIT in support of mot. for summ. judgm. cf
June	18	REPLY memo. of law in opp. to defts. mot. for summary judgment. cf
June	18	AFFIDAVIT of pltf. DeVos in support of opp. to defts' mot. for summ. judg. cf
Oct.	8	MEMORANDUM of law in support of mot. for leave to intervene and/or permission to appear as amicus curiae. cf
Oct.	8	MEMORANDUM of law in support of intervenors' mot. for summary judgment and in opp. to pltf's mot. for summary.
Oct.	8	MOTION for leave to intervene as a party in interest and/or for permission to file brief and appear as amicus curiae by V.I. Bar Association. cf
Oct.	8	CROSS-mot. for summary judgment by intervenor V.I. Bar Assoc. cf
Oct.	8	AFFIDAVIT of Patricia D. Steele in support of mots. cf
Oct.	29	ORDER (ALC) that mot. for leave to intervene is granted; that the cross mot. of intervenor be deemed filed; that the pleadings be amended to reflect the in-

		tervention of the V.I. Bar Association. cf
Dec.	8	MEMORANDUM OPINION (ALC). cf
Dec.	8	JUDGMENT (ALC) granting defts. cross mot. for summary judgment and intervenors cross mot. for summary judgement; that the complt are dismissed on the merits. cf
1987		
Jan.	6	NOTICE of appeal by pltfs. cf
Jan.	9	CERTIFIED copy of MEMO. & OPINION, JUDGMENT, NOTICE OF APPEAL AND DOCKET ENTRIES mailed to USCA along w/trans. letter. cf
Jan.	30	ORDER (USCA) denying petr. to expedite their appeal. EOD 2/4/87. cf
Sept.	30	JUDGMENT (USCA) that judgments of the D.C. entered on 12/8/86 are reversversed and the cause remanded to D.C. w/direction to enter summary judgments in favor of the pltfs. cf

RELEVANT DOCKET ENTRIES

DISTRICT COURT of the VIRGIN ISLANDS

Civil No. 85-207

PROCEEDINGS

DATE 1985		
June	17	COMPLAINT. cf
June	17	MEMORANDUM of law in support of action for injunction and relief. cf
June	17	AFFIDAVIT in support of action for injunction and declaratory relief. cf
June	21	ORDER (ALC) that Lloyd Devos may sit the V.I. Bar exam scheduled for 7/31 and 8/1/85 that the Court reserves ruling on the matter of the eligibility of the above mentioned complt. cf
July	11	SUMMONS issued to Geoffrey W. Barnard-executed on 7/11/86.
DATE 1986		
Feb.	10	MOTION for enlargement of time by deft. cf
Feb.	18	ORDER (ALC) that the time for deft. to resp. to pltfs. complt is enlarged. cf
Feb.	18	CERTIFICATE of service by defts. cf
Mar.	12	ANSWER by deft. cf
Mar.	31	STIPULATION of facts. cf
April	1	MOTION for summary judgment by pltfs. cf
April	1	MEMORANDUM of law in support of pltfs. mot. for summary judgment. cf
April	2	AFFIDAVIT of Lloyd de Vos. cf

April	2	CERTIFICATE of service. cf
June	3	CROSS-MOTION for summary judgment by defts. cf
June	3	MEMORANDUM of law in support of defts. mot. for summ. judg. and in opp. to pltf. mot. for summary judgment. cf
June	3	AFFIDAVIT in support of mot. for summ. judgment. cf
June	18	REPLY Memo. of law in opp. to defts. mot. for summary judgment. cf
June	18	AFFIDAVIT of pltf. DeVos in support of opp. to defts. mot. for summ. judg. cf
Oct.	8	MOTION for leave to intervene as a party in interest and or for permission to file brief and appear as amicus curiae by V.I. Bar Association. cf
Oct.	8	MEMORANDUM of law in support of mot. for leave to intervene or for permission to file a brief and appear as amicus curiae by V.I. Bar Association. cf
Oct.	8	CROSS-MOTION for summary judgment by intervenor V.I. Bar. Assoc. cf
Oct.	8	MEMORANDUM of law in support of intervenors mot. for summary judgment and in opp. to pltfs. mot. for summary judgment. cf
Oct.	8	AFFIDAVIT of Patricia D. Steele in support of mots. cf
Oct.	29	ORDER (ALC) that mot. for leave to intervene is granted; that the cross mot. of intervenor be deemed filed; that the pleadings be amended to reflect the intervention of the V.I. Bar Association. cf

Dec.	8	MEMORANDUM OPINION (ALC). cf
Dec.	8	JUDGMENT (ALC) granting defts. cross mot. for summary judgment and intervenors cross mot. for summary judgment; that the complt are dismissed on the merits. cf
1987		
Jan.	6	NOTICE of appeal by pltfs. cf
Jan.	9	CERTIFIED copy of Memo. & Opinion, Judgment, Notice of Appeal and Docket entries mailed to USCA along w/trans. letter. cf
Jan.	30	ORDER (USCA) denying petr. to expedite their appeal. EOD 2/4/87. cf
Sept.	30	JUDGMENT (USCA) that judgments of the D.C. entered on 12/8/86 are reversed and the cause remanded to D.C. w/direction to enter summary judgment in favor of the pltfs. cf

District Court of the Virgin Islands
Civil No. 85-206

COMPLAINT

1. Jurisdiction is vested in this court by virtue of Section 22 of the Revised Organic Act of the Virgin Islands, 48 U.S.C., Section 1611, and Title 4, Section 32, Virgin Islands Code.

2. Plaintiff is an applicant for admission to the Virgin Islands Bar.

3. Plaintiff is an attorney at law having been admitted to practice before the highest courts of the states of New Jersey and New York.

4. Plaintiff has practiced law continuously since 1983 and is a member of the bar in good standing in each jurisdiction where she has been admitted to practice.

5. On April 22, 1985, plaintiff filed an application with the Committee of Bar Examiners for admission to the Virgin Islands Bar with the required application fees.

6. The application filed by plaintiff with the Committee of Bar Examiners for admission to the Virgin Islands Bar meets all the requirements for admission to the Virgin Islands Bar as set forth in Rule 56, Rules of the District Court of the Virgin Islands, 5 V.I.C. App. V ("Rule 56"), except those requirements, numbered 4 and 5 in paragraph (b) of Rule 56, relating to plaintiff's residence.

7. By letter dated May 28, 1985, defendant rejected said application and refused plaintiff the opportunity to sit for the Virgin Islands Bar Examination scheduled for

July 31 and August 1, 1985 on the basis that the application of plaintiff failed to conform with the requirements of Rule 56.

8. By its decision in *Supreme Court of New Hampshire v. Piper* (No. 83-1466, March 4, 1985), the Supreme Court of the United States held that the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution prohibits a rule of court which makes residence in a jurisdiction a condition of admission to the bar.

9. The Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution is applicable to the Virgin Islands by virtue of Section 3, Revised Organic Act of the Virgin Islands, 48 U.S.C., Section 1561.

10. Refusal of admission of plaintiff to the Virgin Islands Bar by reason of the residence of plaintiff is in violation of Article IV, Section 2, Clause 1 of the United States Constitution.

WHEREFORE, Plaintiff prays that this Court:

1. DECLARE that those requirements, numbered 4 and 5 in paragraph (b) of Rule 56, relating to residency, are unconstitutional as applied to plaintiff; and

2. PERMANENTLY RESTRAIN AND ENJOIN defendant, its successors, agents, attorneys, and employees, and each and every one of them from enforcing those requirements, numbered 4 and 5 in paragraph (b) of Rule 56, relating to residency, as applied to plaintiff; and

3. PERMANENTLY RESTRAIN AND ENJOIN defendant, its successors, agents, attorneys, and employ-

ees, and each and every one of them, from preventing plaintiff from sitting for the Virgin Islands Bar Examination to be held July 31 and August 1, 1985;

4. Such other and further relief as the Court may deem to be just and proper.

Dated: June 14, 1985

Respectfully submitted,

/s/ William L. Blum

District Court of the Virgin Islands
Civil No. 85-207

COMPLAINT

1. Jurisdiction is vested in this court by virtue of Section 22 of the Revised Organic Act of the Virgin Islands, 48 U.S.C., Section 1611, and Title 4, Section 32, Virgin Islands Code.

2. Plaintiff is an applicant for admission to the Virgin Islands Bar.

3. Plaintiff is an attorney at law having been admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Second Circuit and Federal Circuit, the United States District Courts for the District of New Jersey and for the Southern District of New York, the United States Tax Court, the United States Customs Court, the United States Claims Court and the highest courts of the states of New Jersey and New York.

4. Plaintiff has practiced law continuously since 1974 and is a member of the bar in good standing in each jurisdiction where he has been admitted to practice.

5. On May 7, 1985, plaintiff filed an application with the Committee of Bar Examiners for admission to the Virgin Islands Bar with the required application fees. The application having been rejected and returned, but not received by plaintiff, on May 20, 1985, a duplicate original application was filed by plaintiff with the said Committee together with the required application fees.

6. The application filed by plaintiff with the Committee of Bar Examiners for admission to the Virgin

Islands Bar meets all the requirements for admission to the Virgin Island Bar as set forth in Rule 56, Rules of the District Court of the Virgin Islands, 5 V.I.C. App. V ("Rule 56"), except those requirements, numbered 4 and 5 in paragraph (b) of Rule 56, relating to plaintiff's residence.

7. By letters dated May 8, 1985 and May 28, 1985, defendant rejected said application and refused plaintiff the opportunity to sit for the Virgin Islands Bar Examination scheduled for July 31 and August 1, 1985 on the basis that the application of plaintiff failed to conform with the requirements of Rule 56.

8. By its decision in *Supreme Court of New Hampshire v. Piper* (No. 83-1466, March 4, 1985), the Supreme Court of the United States held that the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution prohibits a rule of court which makes residence in a jurisdiction a condition of admission to the bar.

9. The Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution is applicable to the Virgin Islands by virtue of Section 3, Revised Organic Act of the Virgin Islands, 48 U.S.C., Section 1561.

10. Refusal of admission of plaintiff to the Virgin Island Bar by reason of the residence of plaintiff is in violation of Article IV, Section 2, Clause 1 of the United States Constitution.

WHEREFORE, Plaintiff prays that this Court:

1. DECLARE that those requirements, numbered 4 and 5 in paragraph (b) of Rule 56, relating to residency, are unconstitutional as applied to plaintiff; and

2. PERMANENTLY RESTRAIN AND ENJOIN defendant, its successors, agents, attorneys, and employees, and each and every one of them from enforcing those requirements, numbered 4 and 5 in paragraph (b) of Rule 56, relating to residency, as applied to plaintiff; and

3. PERMANENTLY RESTRAIN AND ENJOIN defendant, its successors, agents, attorneys, and employees, and each and every one of them, from preventing plaintiff from sitting for the Virgin Island Bar Examination to be held July 31 and August 1, 1985;

4. Such other and further relief as the Court may deem to be just and proper.

Dated: June 14, 1985

Respectfully submitted,

/s/ William L. Blum

District Court of the Virgin Islands
Civil No. 85-207

ORDER TO SHOW WHY A PRELIMINARY INJUNCTION SHOULD NOT BE ISSUED

Upon the annexed affidavit of Lloyd De Vos, verified on June 7, 1985, and on all the proceedings heretofore had herein, let the defendant show cause, if he has any, before the undersigned, Judge ————, of the District Court of the Virgin Islands, Division of St. Thomas and St. John, in the Federal Building, Charlotte Amalie, St. Thomas, United States Virgin Islands on the — day of ————, 1985, at — o'clock or as soon thereafter as counsel can be heard why a preliminary injunction should not be granted herein enjoining and restraining the defendant, and its successors, agents, attorneys and employees, and each and every one of them, from (1) RESTRAINING AND ENJOINING defendant, its successors, agents, attorneys, and employees, and each and every one of them from enforcing those requirements, numbered 4 and 5 in paragraph (b) of Rule 56 of the Rules of the District Court of the Virgin Islands, 5 V.I.C. App. V ("Rule 56"), relating to residency, as applied to plaintiff, (2) RESTRAINING AND ENJOINING defendant, its successors, agents, attorneys, and employees, and each and every one of them, from preventing plaintiff from sitting for the Virgin Islands Bar Examination to be held July 31 and August 1, 1985 and (3) granting such other and further relief as to the Court may seem just and proper.

Defendant's responsive papers and memorandum of law shall be served [sic] upon plaintiff no later than 5 p.m. in the afternoon of the — day of June, 1985.

Sufficient reason appearing, therefore it is:

ORDERED that service of a copy of this Order, together with copies of the papers upon which it was made upon the defendant on or before the — day of June, 1985, shall be deemed good and sufficient notice of this application; and it is further

ORDERED that pending the hearing and determination of this motion for a preliminary injunction, the defendant be and hereby is temporarily restrained from (1) enforcing those requirements, numbered 4 and 5 in paragraph (b) of Rule 56, relating to residency, as applied to plaintiff, and (2) preventing plaintiff from sitting for the Virgin Islands Bar Examination to be held July 31 and August 1, 1985.

SO ORDERED

Dated: Charlotte Amalie,
St. Thomas
U. S. V. I.
June —, 1985

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS

Civil No. 85-206

AFFIDAVIT

I, Susan Esposito, being duly sworn, depose and state:

1. I am an applicant for admission to the Virgin Islands Bar.

2. I am an attorney at law having been admitted to practice before the highest courts of the states of New Jersey and New York.

3. I have practiced law continuously since 1983 and am a member of the bar in good standing in each jurisdiction where I have been admitted to practice.

4. On April 22, 1985, I filed an application with the Committee of Bar Examiners for admission to the Virgin Islands Bar with the required application fees.

5. My application filed with the Committee of Bar Examiners for admission to the Virgin Islands Bar meets all the requirements for admission to the Virgin Islands Bar as set forth in Rule 56, Rules of the District Court of the Virgin Islands, 5 V. I. C. App. V ("Rule 56"), except those requirements, numbered 4 and 5 in paragraph (b) of Rule 56, relating to my residence.

6. By letter dated May 28, 1985, defendant rejected my application, and refused me the opportunity to sit for the Virgin Islands Bar Examination scheduled for July

31 and August 1, 1985 on the basis that my application failed to conform with the requirements of Rule 56.

Dated: June 7, 1985

/s/ Susan Esposito
Susan Esposito

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS

85-207

AFFIDAVIT

I, Lloyd De Vos, being duly sworn, depose and state:

1. I am an applicant for admission to the Virgin Islands Bar.

2. I am an attorney at law having been admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Second Circuit and Federal Circuit, the United States District Courts for the District of New Jersey and for the Southern District of New York, the United States Tax Court, the United States Customs Court, the United States Claims Court and the highest courts of the states of New Jersey and New York.

3. I have practiced law continuously since 1974 and am a member of the bar in good standing in each jurisdiction where I have been admitted to practice.

4. On May 7, 1985, I filed an application with the Committee of Bar Examiners for admission to the Virgin Islands Bar with the required application fees. The application having been rejected and returned, but not received by me, on May 20, 1985, I filed a duplicate original application with the said Committee together with the required application fees.

5. My application filed with the Committee of Bar Examiners for admission to the Virgin Islands Bar meets all the requirements for admission to the Virgin Islands Bar as set forth in Rule 56, Rules of the District Court

of the Virgin Islands, 5 V. I. C. App. V ("Rule 56"), except those requirements, numbered 4 and 5 in paragraph (b) of Rule 56, relating to my residence.

6. By letters dated May 8, 1985 and May 28, 1985, defendant rejected my application, and refused me the opportunity to sit for the Virgin Island Bar Examination scheduled for July 31 and August 1, 1985 on the basis that my application failed to conform with the requirements of Rule 56.

Dated: June 7, 1985

/s/ Lloyd De Vos
Lloyd De Vos

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

SUSAN ESPOSITO, Plaintiff v. GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally.	)	CIVIL NO. 85-206

ORDER

AND NOW, this 21st day of June, 1985,

IT IS ORDERED that Susan Esposito may sit the Virgin Islands Bar examination scheduled for July 31 and August 1, 1985, upon condition, however, that the Court reserves ruling on the matter of the eligibility of the above-mentioned applicant for admission to the Bar of the Virgin Islands.

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

LLOYD DE VOS, Plaintiff v. GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally.	)	CIVIL NO. 85-207

ORDER

AND NOW, this 21st day of June, 1985,

IT IS ORDERED that Lloyd De Vos may sit the Virgin Islands Bar examination scheduled for July 31 and August 1, 1985, upon condition, however, that the Court reserves ruling on the matter of the eligibility of the above-mentioned applicant for admission to the Bar of the Virgin Islands.

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil Nos. 85-206 and 85-207

ANSWER

COMES NOW the defendant, by and through his undersigned counsel, and answering plaintiffs' complaints states:

1. Admitted

2. Admitted

3. Defendant lacks information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 3.

4. Defendant lacks information sufficient to form a belief as to the truth or falsity of the allegations set forth in paragraph 4.

5. Admitted

6. Admitted

7. Admitted, except that the applicants were subsequently permitted to take the bar examination by order of the court dated June 21, 1985, reserving, however, any ruling on the matter of the eligibility of the applicants for admission to the bar of the Virgin Islands.

8. The validity of the characterization of the decision of the United States Supreme Court in *Supreme Court of New Hampshire vs. Piper,* as set forth in paragraph 8 of plaintiffs' complaints, is denied.

9. The references to provisions of the United States Constitution and to the Virgin Islands Organic Act, while not being allegations of fact, are admitted.

10. Denied

WHEREFORE defendant prays that the court dismiss plaintiffs complaints, enter an order denying plaintiffs admission to the bar of the Virgin Islands unless and until they satisfy the requirements of Rule 56 of the District Court of the Virgin Islands, and for such other and further relief as the court deems just in the premises.

DATED: 3/11/86

Respectfully submiited,

/s/ Maria Hodge
Maria Tankenson Hodge, P.C.

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS

Civil Nos. 85-206 and 85-207

STIPULATION OF FACTS

It is hereby stipulated by and between the above entitled parties, by their respective attorneys, as follows:

1. Plaintiff Lloyd De Vos is an attorney at law having been admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Second Circuit and Federal Circuit, the United States District Courts for the District of New Jersey and for the Southern District of New York, The United States Tax Court, The United States Customs Court, the United States Claims Court and the highest courts of the states of New Jersey and New York.

2. Plaintiff Lloyd De Vos has practiced law continuously since 1974 and is a member of the bar in good standing in each jurisdiction where he has been admitted to practice.

3. Plaintiff Susan Esposito Thorstenn is an attorney at law having been admitted to practice before the highest courts of the states of New Jersey and New York.

4. Plaintiff Susan Esposito Thorstenn has practiced law continuously since 1983 and is a member of the bar in good standing in each jurisdiction where she has been admitted to practice.

5. Plaintiff Susan Esposito Thorstenn resides in New York and Plaintiff Lloyd De Vos resides in New

Jersey. Both plaintiffs maintain offices for the practice of law in New York.

6. Neither plaintiff has the present intention to take up residence in the Virgin Islands.

Dated: 3/31/86

By: /s/ William L. Blum
William L. Blum
De Vos & Co.
Attorneys and Counselors

3/31/86

By: /s/ Maria Hodge
Maria Tankenson Hodge, P.C.
Attorney for Defendant

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS

Civil Nos. 85-206 and 85-207

AFFIDAVIT

I, Lloyd De Vos, being duly sworn, depose and state:

1. I am a resident of New Jersey and an attorney-at-law licensed to practice in the States of New York and New Jersey. I am a partner with a Virgin Islands admitted attorney in a Virgin Islands law firm known as De Vos & Co. The Virgin Islands law firm consists of a resident managing partner, two resident associates, and one attorney who serves in an "of counsel" position. In addition, when the work load so requires, attorneys from other offices of our firm work in the Virgin Islands office for temporary periods to assist and are supervised by the resident managing partner. While I am not yet admitted to the bar of the Virgin Islands, and thus do not practice law in the Virgin Islands, I am responsible for administrative matters of the Virgin Islands firm. These responsibilities require me to travel frequently to the Virgin Islands and to communicate with the Virgin Islands from New York and elsewhere in the United States and around the world by telephone, telex, and telefax nearly every business day. Thus I am very familiar with the availability and reliability of communications and transportation between the Virgin Islands and the mainland United States.

2. Over the past eighteen months I have visited the Virgin Islands from New York or Miami approximately twenty times. These visits required me to travel on virtually every day of the week and nearly every month of the year, including the so-called "tourist season" from December through April. My travel has been exclusively by air primarily utilizing the New York gateway and occasionally the Miami and San Juan gateways. In all of this travel to the Virgin Islands I have never been unable to secure a reservation on a commercial flight for the day I desired to travel, even when I made my reservations on the day of or on the day before my intended travel date. The Virgin Islands is served by four major trunk air carriers, American Airlines, Eastern Air Lines, Pan American World Airways, and Midway Express Airlines. During the tourist season these airlines provide approximately seven to nine flights daily in each direction from the Virgin Islands to the mainland United States. At other times of year the number of daily flights is reduced to approximately five to six. In addition the Virgin Islands is presently served by approximately six commuter airlines which provide service to San Juan, Puerto Rico where connections are available to at least one dozen daily flights to the mainland United States, including non-stop and through flights to New York, Newark, Chicago, Philadelphia, Atlanta, Boston, St. Louis, Miami, and Baltimore. The St. Thomas-San Juan route has consistently been among the top five commuter airline routes in the United States in terms of number of passengers carried and number of flights and the St. Croix-San Juan route has consistently been among the top ten.

3. Telephone communications between the Virgin Islands and the United States is at mainland standard. I communicate with the Virgin Islands on the average of

twice every business day when I am not in the Virgin Islands. I communicate with various locations in the mainland United States and to other countries on the average of twelve times a day when I am in the Virgin Islands. The Virgin Islands office of De Vos & Co. has Wide Area Telephone Service (WATS) available for the use of our attorneys and clients, the most modern telex service, and access to modern telefax machines that transmit facsimiles of documents over telephone lines. In my experience, about 99 percent of my telephone connections to and from the Virgin Islands are made without the necessity for redialing. Although occasionally I have experienced static on a telephone connection to the Virgin Islands, this does not happen significantly more often than in calls I make within the United States or locally in New York and New Jersey. Similarly, I have not experienced problems with the quality of telecopier or telex transmissions either to or from the Virgin Islands.

4. The modern telecommunications and transportation services now available in the Virgin Islands have essentially integrated the Territory into the United States for many purposes. It is no more difficult to communicate or travel over the 1100 miles of water that separates the Virgin Islands from the closest point on the mainland than to do so over shorter distances in the United States. Conferences with clients, other lawyers, and court officials are easily accomplished by telephone and telex. In the infrequent cases where face-to-face meetings must be held, they can be scheduled on short notice due to the frequency and availability of scheduled air service. In no case should client contact or contact with other attorneys or court

officials be difficult or impossible for the Virgin Islands admitted attorney residing in the mainland nor should the clients of such an attorney be expected to suffer detrimental consequences as result of the non-residence of the attorney.

5. Granting admission to non-residents may increase the work load of the Committee of Bar Examiners. To address this possibility the Committee should be expanded preferably to include some non-residents. These non-resident members would not only ease the burden on the other members but could provide assistance in checking the qualifications of non-resident applicants for admission. In any event, the increased burden with regard to checking qualifications of potential admittees is relatively small in that the Committee has traditionally utilized the services of the National Conference of Bar Examiners to compile most of this information. Upon my admission to the Virgin Islands Bar, I will be pleased to volunteer to serve on the Committee.

6. The responsibility to attend to late-scheduled court appearances, whether in a civil, criminal, or appointed-criminal matter, can be most easily met by a non-resident attorney with the assistance of other members of his firm who would be expected to be thoroughly familiar with the background and status of the case. This may be in contrast to the associated local counsel of a *pro hac vice* admittee who may not be required to be thoroughly familiar with the case. In our law firm, it is our practice to require that at least two attorneys be familiar with the proceedings in a litigation matter in order to handle any

last minute problems that may arise while one of the attorneys may be unavailable.

Dated: June 16, 1986

/s/ Lloyd De Vos
Lloyd De Vos

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

CIVIL NOS. 85-206 and 85-207

AFFIDAVIT

COMES NOW Geoffrey Barnard, who, after being duly sworn, deposes and says:

1. That I am the Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, duly appointed by the Chief Judge of the District Court of the Virgin Islands, and in such capacity I am familiar with the following information concerning Rule 56 of the District Court of the Virgin Islands with respect to its requirements for residence applicable to applicants seeking admission to the Virgin Islands Bar.

2. The United States Virgin Islands are located approximately 1,500 miles from the Continental United States and can be reached only by air or by sea. Commercial air transportation from the Continental United States to the United States Virgin Islands from the closest point, in Florida, takes not less than two and one-half hours. At many times of the year, particularly during what is locally referred to as "the tourist season" between December and April, reservations may be totally unavailable for commercial flights from the Continental United States for protracted periods of time. Travel to the United States Virgin Islands by sea can be accomplished, for practical purposes, only by cruise ship which takes at a minimum several days of sea travel from the closest mainland point.

3. Telephone communication between the United States Virgin Islands and the Continental United States, while substantially improved in recent years, remains significantly less reliable than that normally expected within the Continental United States. It is often difficult to secure a long distance connection to a distant point, or to maintain a fully audible conversation without interference from static, voice fade outs, transmission gaps, or disconnections. Mail delivery is often unreliable and almost always involves material delay.

4. There can be no meaningful comparison between a lawyer commuting between immediately adjacent states and attorneys seeking to reside in the Continental United States and maintain a practice of law in the Virgin Islands. A client's need for access to his lawyer, whether to confer about matters requiring immediate decision or for purposes of litigation, civil or criminal, would, in the opinion of the Committee of Bar Examiners, present substantial risk of detrimental consequence to the client of a non-resident lawyer for whom the preceeding description of travel and communication problems could make such client contact difficult or impossible.

5. There are foreseeable reasons why many lawyers not resident in the United States Virgin Islands might wish to accept a small number of cases and undertake the effort and expense associated with admission to the Bar of this jurisdiction, which would not apply to most locations in the United States. This is true because the United States Virgin Islands is widely thought of as a resort destination to which persons may wish to travel for purposes of vacationing rather than making a fulltime ca-

reer. For this reason, a professional might well think it financially justifiable to seek admission to the Virgin Islands' Bar without making a commitment to the practice of law here with the intention of occasionally combining a vacation visit with some brief attention to a client's affairs. Under these circumstances, such a lawyer could well fail to familiarize himself with and maintain a current mastery of changing local rules and procedures, as well as local law.

6. The Committee of Bar Examiners in the Virgin Islands consists of the named defendant, who is an official of the court, and four private attorneys who volunteer time to serve when appointed by the court as bar examiners. These attorneys must not only prepare, administer and grade the examinations, but are responsible for scrutinizing the ethical standards of applicants for admission. The resources of the small Virgin Islands Bar could never accommodate a serious and adequate investigation into the professional competence by examination or the ethical standards of non-resident lawyers, both because the absence of such lawyers from the jurisdiction would make investigation of their conduct, history and practice unmanageable, and because, with increasing numbers of applicants for admission to the bar, the small committee would find it totally impossible to give and administer meaningful examination.

7. The Committee has also felt that the admission of non-residents to practice law in the Virgin Islands would increase the risk of unethical persons being permitted to practice law in that it would be virtually impossible for so small community with such limited resources to discover episodes of unethical conduct by such attorneys at their

distant states of residence, and, thus to protect our residents from unscrupulous lawyers.

8. The Rules of the District Court, with respect to residence, require that in order to be an active member of the Virgin Islands Bar, one must be a resident of the Territory. An attorney who has been admitted to the Bar of the Virgin Islands and then later terminates his residence is relegated to an inactive status and cannot resume active status unless he resumes his residency in the Territory.

9. The District Court has also had experience with permitting non-resident lawyers to practice on a *pro hoc vice* basis in the Territory upon condition that they associate with local counsel. This practice, while permitted on a limited basis, has proven to present many problems including the frequent complaint, when local counsel is called upon to appear at a hearing or proceeding to which the distant lawyer cannot come because of travel obstacles, that the local attorney is not or cannot be ready for the proceeding in that he has relied upon the distant lawyer as lead counsel. This has frequently inconvenienced the court and resulted in loss of judicial resources and inconvenience to parties and other counsel. If this were permitted for all non-resident lawyers, the already heavily burdened district court calendar would, in the Committee's view, almost certainly become totally unmanageable.

10. The District Court of the Virgin Islands also requires by rule that all attorneys undertake on a rotating basis the duty to represent indigents in criminal matters in which the public defender is not able to serve. This represents a sizeable demand upon all attorney's time

requiring three or four appointments per year on average. This also requires that such attorneys be ready on immediate notice to respond to a need to counsel with a client and to give him immediate advice, as well as to appear at early preliminary proceedings. Even if, by rule, such non-resident applicants to the bar were required to do their equitable share of such work for indigents, the foreseeable detriment to the clients themselves from delinquent, absent or unavailable council is a serious concern for the Committee and the court.

FURTHER AFFIANT SAYETH NOT

DATED: June 2, 1986

/s/ G. M. Barnard
Geoffrey Barnard

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

SUSAN ESPOSITO THORSTENN, Plaintiff, vs. GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally, Defendant.	) CIVIL No. 206/1985
LLOYD DE VOS, Plaintiff, vs. GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally, Defendant.	) CIVIL No. 207/1985

MOTION FOR LEAVE TO INTERVENE AS A PARTY IN INTEREST AND/OR FOR PERMISSION TO FILE BRIEF AND APPEAR AS AMICUS CURIAE

The Virgin Islands Bar Association, by and through its undersigned counsel, respectfully moves pursuant to

Rule 24(b) of the Federal Rules of Civil Procedure for an Order granting leave for the Virgin Islands Bar Association to intervene in the above-captioned litigation as a party in interest. In the alternative, the Virgin Islands Bar Association requests permission to file a brief and appear in the action as *amicus curiae*. The undersigned has been authorized by resolution of the Board of Governors to file this Motion and represent the interests of the members of the Virgin Islands Bar Association in all pending litigation challenging the validity of the residency requirements for admission to the Bar.

This Motion is based upon the fact that the outcome of this litigation may substantially affect the Virgin Islands Bar Association and its members. This Motion is further supported by the Memorandum submitted herewith.

DATED: October 7, 1986

/s/ Diane Trace Warlick
DIANE TRACE WARLICK
Law Offices of R. Eric Moore
P.O. Box 3086
Christiansted, St. Croix 00820
Attorney on behalf of Virgin
Islands Bar Association

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

Civil Nos. 85-206 and 85-207

AFFIDAVIT

TERRITORY OF THE VIRGIN ISLANDS)
DISTRICT OF ST. CROIX) ss:

I, PATRICIA D. STEELE, being duly sworn, deposes and states:

1. That I am President of the Virgin Islands Bar Association. I am familiar with Rule 56 of the District Court of the Virgin Islands with respect to requirements for admission to the Virgin Islands Bar (integrated).

2. That this Affidavit is based upon my personal knowledge in my capacity as President of the Virgin Islands Bar Association.

3. That I personally receive approximately three inquiries per month from non-resident attorneys regarding the requirements for admission to practice law in the Virgin Islands. As most of these inquiries do not result in application for admission, it may be presumed that a significant number of these individuals do not intend to reside or maintain an office in the Virgin Islands.

4. That, while telecommunications between the Virgin Islands and the continental United States have improved substantially in the last decade, they remain erratic and conversations are frequently impaired by static, echoes, transmission gaps and disconnections.

5. That all members of the Virgin Islands Bar are required to accept appointments to represent indigent criminal defendants approximately four times per year. These appointments require the attorney to appear for hearings and face-to-face consultations with the defendants on short notice. It has been a long-standing rule of the District Court that this obligation cannot be fulfilled by arranging for another attorney to appear in the place of the appointed counsel.

6. That there are very lengthy delays between the issuance of opinions by the Virgin Islands Courts and their publication, if they are published. The most recent volume of the Virgin Islands Reports contains opinions issued in 1983 and early 1984. Slip opinions are generally not disseminated to attorneys. They are available only by reviewing the opinions in the office of the law clerks for the District Court judges. Many significant opinions are "published" only in the St. Croix and St. Thomas Supplements.

7. That most of the essential work of the Virgin Islands Bar Association, including investigation of grievances and unethical conduct, are performed by volunteer members of the Virgin Islands Bar. With the current size and geographically limited area of practice of members of the Virgin Islands Bar, it is already difficult to effectively carry out the committee functions on a timely basis. With an increased size of the Bar and members residing in distant geographic locations, it would be virtually impossible for these volunteer committees to effectively handle the duties assigned to them, which are necessary to protect members of the public from unethical and/or incompetent practice. It is difficult enough to get resident members of the Bar to travel from St. Thomas to St. Croix and vice versa to attend meetings of the Bar Association and its committees.

8. I have reviewed the Affidavit of Geoffrey W. Barnard, submitted in support of his Motion for Summary Judgment, and I concur in all the statements he has made.

DATED: 10/7/86

/s/ Patricia D. Steele
PATRICIA D. STEELE

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

SUSAN ESPOSITO THORSTENN, Plaintiff, vs. GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally, Defendant.	CIVIL NO. 206/1985

LLOYD DE VOS, Plaintiff, vs. GEOFFREY W. BARNARD, in his capacity as Chairman of the Committee of Bar Examiners of the Virgin Islands Bar, and not personally, Defendant.	CIVIL NO. 207/1985

ORDER

Upon Motion by the applicant, Virgin Islands Bar Association, for leave to Intervene as a party in interest,

the Court being fully advised in the premises, and it appearing that the applicant's defense and the main action involve a common question of law and fact; and it further appearing that the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties; it is hereby

ORDERED, ADJUDGED AND DECREED:

That the Motion for Leave to Intervene is Granted; and further,

ORDERED that the Cross-Motion of the Intervenor be deemed filed; and further,

ORDERED that the pleadings be amended to reflect the intervention of the Virgin Islands Bar Association.

DATED: October 29, 1986

/s/ Almeric L. Christian
JUDGE OF THE DISTRICT COURT

VIRGIN ISLANDS BAR ASSOCIATION
P.O. BOX 990, ST. THOMAS U.S.V.I. 00801
TELEPHONE (809) 776-3470
March 4, 1987

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MEMORANDUM

TO: All Members of the Virgin Islands Bar Association

FROM: HENRY C. SMOCK, Chairman, Continuing Legal Education Committee

RE: Territorial and District Court Opinions

The Virgin Islands Bar Association has recently been given the responsibility of distributing all Territorial and District Court opinions. Henceforth, neither the Territorial nor the District Court shall distribute opinions other than through the Virgin Islands Bar Association.

Any member wishing to subscribe to the opinions should send a check in the amount of $25.00 *payable to the Virgin Islands Bar Association* to either of the following persons:

HENRY C. SMOCK, ESQ.
Grunert, Stout & Smock
P.O. Box 1030
St. Thomas, Virgin Islands 00801
Telephone: 774-1320

PATRICIA D. STEELE, ESQ.
Law Offices of R. Eric Moore, Esq.
P. O. Box 3086
Christiansted
St. Croix, Virgin Islands 00820
Telephone: 773-4150

Your $25.00 check will ensure that you receive opinions for the space of one year, beginning April 1, 1987. Thereafter, the Virgin Islands Bar Association reserves the right to change the subscription rate in accordance with the demand and the output of both Courts.

If you have any questions concerning this new subscription service, please feel free to call me at 774-1320.

Henry C. Smock

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3034 and 87-3035

AFFIDAVIT

TERRITORY OF THE VIRGIN ISLANDS)
DISTRICT OF ST. THOMAS & ST. JOHN) ss.:

I, WILLIAM L. BLUM, being duly sworn, deposes and states:

1. I am an attorney at law admitted to the Virgin Islands Bar and I am counsel to the Appellants in this appeal.

2. As an attorney admitted to the Virgin Islands Bar, I regularly receive mail from the Virgin Islands Bar Association, Appellee-Intervenor in this appeal, regarding matters of interest to the Bar.

3. On April 16, 1987 I received a memorandum, a copy of which is attached as Exhibit A to the motion which this affidavit accompanies and supports, from the Chairman of the Virgin Islands Bar Association's Continuing Legal Education Committee.

4. The memorandum is dated March 4, 1987, after the date appellant's brief in this matter was due and prior to the date appellees' briefs were due, and offers subscriptions to members of the Virgin Islands Bar to all opinions of the District and Territorial Courts of the Virgin Islands. In order to obtain such subscriptions, members of the bar are directed by the memorandum to send payment to either the Committee Chairman or to Patricia D. Steele, Esq. who submitted an affidavit on behalf of the Appellee-Intervenor in the proceeding below (App. 66)

which included a statement that local court slip opinions are not generally available to attorneys except by visiting the Court House. The court below adopted this position in its decision (App. 85-86).

5. Such offer of subscriptions has a direct bearing on one of the important issues on which the court below based its decision and which was challenged in appellant's brief, namely the availability of a less restrictive means to ensure that non-resident members of the Virgin Islands Bar are kept aware of current developments in local law than prohibiting their admission to the bar.

DATED: April 17, 1987

/s/ William L. Blum
WILLIAM L. BLUM

PETITIONER'S

BRIEF

(4) (2)

Nos. 87-1939 and 87-2008

In The

Supreme Court of the United States

October Term, 1987

GEOFFREY W. BARNARD, AS CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS,

Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,

Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,

Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT BRIEF OF PETITIONERS

MARIA TANKENSON HODGE*
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Counsel for Petitioner Geoffrey W. Barnard, Chairman of the Committee of the Bar Examiners of the Virgin Islands

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Christiansted, St. Croix 00820
(809) 773-3535
Counsel for Petitioner Virgin Islands Bar Association

*Counsel of Record

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or call collect (402) 342-2831

QUESTION PRESENTED

The United States Virgin Islands is a group of three Caribbean islands located approximately 1500 miles from the continental United States. It is an unincorporated territory in which a federally established court, the District Court of the Virgin Islands, is both the federal trial court and the court of appeals for the territorial courts. The district court's rules provide that one must be a resident of the territory in order to be admitted to the bar. The United States Court of Appeals for the Third Circuit, sitting *en banc*, held that this Court's ruling in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987), was binding precedent requiring the exercise of the circuit's supervisory power to invalidate the Virgin Islands residency rule.

The Question Presented for review by this Court is:

Whether the decision in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987), prohibits a federal court in the unincorporated territory of the United States Virgin Islands from requiring residence as a requisite for the practice of law.

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OPINIONS BELOW

The United States District Court of the Virgin Islands held that several substantial reasons exist to justify the residency requirement. Moreover, the discrimination practiced against nonresidents was held to be the least restrictive means of preventing the harm which would be caused by the admission of nonresident attorneys to the bar. The district court's decision is unreported and appears at pages 58a to 67a of the appendix to the petition for a writ of certiorari.[1] Pet. App. 58a to 67a.

On appeal to the United States Court of Appeals for the Third Circuit, a three judge panel found that *Frazier v. Heebe* required the circuit to exercise its supervisory powers over the District Court of the Virgin Islands, and the circuit reversed the district court's decision. The panel's decision was originally reported at 829 F. 2d 463 (3d Cir. 1987), but was later withdrawn from the bound volume because the circuit court granted rehearing *en banc* and the panel judgment and opinion was vacated. The opinion of the panel appears at Pet. App. 35a to 57a.

Following a Rehearing *en banc* before the Third Circuit, the judgment of the district court was reversed. The *en banc* decision of the court is reported at 842 F. 2d 1393 (3d Cir. 1988) and is reprinted at Pet. App. 1a to 34a.

[1] All references herein to the appendix to the petition for a writ of certiorari refer to the appendix filed by petitioner Geoffrey W. Barnard in No. 87-1939 and are described by the designation "Pet. App.". The designation "Jt. App." is used to describe items in the joint appendix filed herewith.

JURISDICTION

The opinion of the court of appeals following the Rehearing *en banc* was filed on March 31, 1988. Petitions for a writ of certiorari were timely filed on May 23, 1988, by Geoffrey Barnard, as Chairman of the Committee of Bar Examiners and on June 6, 1988 by the Virgin Islands Bar Association. Both petitions were granted on June 30, 1988, and consolidated for purposes of appeal.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the following:

Revised Organic Act of the Virgin Islands of 1954, §§ 21 through 25, and 27 codified at 48 U.S.C. §§ 1611-1615, 1617, and Rules of the District Court of the Virgin Islands, V.I. Code Ann. Tit. 5 App. V Rule 16 and Rule 56(b) (4) and (5) (1982). All of these provisions are set forth in the appendix to the petition for a writ of certiorari.

STATEMENT OF THE CASE

Appellees Susan Esposito Thorstenn and Lloyd DeVos (hereinafter "applicants") are attorneys at law, having been admitted to practice before certain state and federal courts. Thorstenn and DeVos are residents of New York and New Jersey, respectively, and both maintain offices

for the practice of law in New York. However, neither applicant intended to take up residence in the Virgin Islands. Jt. App. 31. In May of 1985, the applicants filed petitions with the United States District Court of the Virgin Islands (hereinafter "the district court") seeking admission to the Virgin Islands Bar Association (hereinafter "the Bar"). The rules of admission to the Bar, as well as the rules of practice, are established by the district court. Those rules provide, inter alia, that admission to the Bar as an active member requires that, the applicant, "[i]f admitted to practice, . . . intends . . . to continue to reside in and to practice law in the Virgin Islands." V.I.C. Code Ann. Tit. 5 App. V R 56(b)(5). Accordingly, under the rule cited, the Committee of Bar Examiners (hereinafter "the Bar Examiners") declined to certify them as qualified to sit the bar examination or to be admitted to the bar.

The applicants then sought a declaratory judgment in the district court arguing that the residency requirement was unconstitutional, citing the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution as interpreted in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). Jt. App. 13-19.

Both applicants were permitted by court order to sit and both passed the Virgin Islands bar exam. Jt. App. 26-27. Due to the applicants' failure to satisfy the residency rule, the Bar Examiners declined to certify them qualified for admission to the bar.

The applicants then filed motions for summary judgment, and the Bar Examiners filed a cross-motion for sum-

mary judgment, each relying on affidavits submitted in support of their respective contentions. On motion, the Bar was permitted to intervene as a party in interest and the Bar also moved for summary judgment.

In support of the Bar's motion, an affidavit of the president of the Bar was submitted. Her affidavit described telecommunications between the Virgin Islands and the mainland U.S. as "erratic," involving "conversations . . . frequently impaired by static, echoes, transmission gaps and disconnection." Jt. App. 44. She also described the responsibility under the district court's rules of practice, requiring all members of the Bar to "accept appointments to represent indigent criminal defendants approximately four times per year. These appointments require the attorney to appear for hearings and face-to-face consultations with the defendants on short notice." Jt. App. 44-45. She also described the "very lengthy delay between the issuance of opinions by the Virgin Islands Courts and their publication, if they are published." Jt. App. 45. As of the date of the affdavit (October 7, 1986) the "most recent volume of the Virgin Islands Reports contained opinions issued in 1983 and early 1984.[2] Slip opinions are generally . . . available only by reviewing the opinions in the office of the law clerks for the District Court judges," and many significant opinions are 'published' only in the photocopied St. Croix and St. Thomas Supplements in the court's library. Jt. App. 45.

The Bar's affidavit also described the limited resources of the small bar and its volunteer committee on

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[2] The most recent volume of the Virgin Islands Reports, published in 1987, contains opinions entered by the courts in 1984 and 1985.

ethics and grievances. This small group, according to the affidavit, would find it "virtually impossible" to effectively handle the surveillance of nationwide bar members. Jt. App. 45.

The Bar Examiners submitted the affidavit of the Chairman of the Committee of the Bar Examiners, who was also the Clerk of the District Court. In addition to corroborating much of the content of the Bar's affidavit, the Bar Examiners' affidavit described the physical characteristics of the territory, located some "1500 miles from the Continental United States" reachable "only by air or by sea." Air travel from the closest point in the mainland "takes not less than 2½ hours." Jt. App. 37. The Bar Examiners' affidavit noted the virtual unavailability of air reservations at certain times of the year, particularly in the Caribbean's tourist season. The alternative, travel by sea, "takes at a minimum of several days of sea travel from the closest mainland point." Jt. App. 37. Agreeing that telephone service was unreliable, he noted also that "mail delivery is often unreliable and almost always involves material delay." Jt. App. 38.

The Bar Examiners' affidavit also described the court's experience with *pro hac vice* admissions. According to the Chairman and Clerk of the Court, these admissions, even though limited in number, had caused many problems, particularly when stateside counsel could not appear at a hearing due to travel obstacles, and their local counsel, when called on to appear, answered he could not be ready because he relied on stateside counsel as "lead counsel." The court's already congested calendar would, if general nonresident admission were allowed, "almost certainly become totally unmanageable." Jt. App. 40.

In support of their claim, applicants submitted the affidavit of Lloyd DeVos, one of the applicants. He stated that in the 18 month period he had been associated with a partner in St. Thomas, he had travelled to the Virgin Islands "approximately 20 times" and had never been unable to obtain a reservation, either on a direct flight or through Miami and Puerto Rico. Jt. App. 32-33. He stated that telephone communications between the Virgin Islands and the United States is at "mainland standard." He stated that conferences with clients, other lawyers, and court officials "are easily accomplished by telephone and telex." Jt. App. 33-34.

After receipt of all affidavits, the district court ruled on the motions, and having found that there were substantial reasons justifying the residency requirement in the special circumstances of the territory, granted summary judgment to the Bar Examiners. Pet. App. 58a to 59a.

The district court, applying the analysis of *Piper*, found the facts underlying the Virgin Islands' rule distinguishable from those evident in New Hampshire. Citing difficulties in travel to and from the mainland, erratic telephone service which is sometimes unavailable altogether, undependable document transport, unavailability of Virgin Island statutes, legal reports and opinions on the mainland due to protracted delays in publication, one of the heaviest judicial case loads in the entire United States district court system and the resulting need for highly efficient management of case loads which would be materially undermined by "interruptions to accommodate delays occasioned by nonresident lawyers attempting to reach the islands," and the obligation of all practicing

attorneys in the territory to share the responsibility to represent indigent criminal defendants, a feat virtually impossible for nonresidents to effectively perform, the court concluded that "the discrimination practiced against nonresidents . . . is the least restrictive means of preventing the harm which would be caused . . ." by their admission. Pet. App. 67a.

The applicants then appealed to the United States Court of Appeals for the Third Circuit, where the circuit considered arguments not only on *Piper* and the Privileges and Immunities Clause, but also on the applicability of the court's supervisory powers as used in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987).[3] A three judge panel of the court of appeals, in a split decision relying on *Frazier*, concluded it was bound to exercise its supervisory powers over the district court to strike the rule, and reversed the district court decision. The matter was then reheard *en banc*, where a majority determined that *Frazier* was binding precedent even as to the Virgin Islands, and issued an opinion reversing the district court and directing the lower court to enter summary judgment in favor of the applicants.

A petition for certiorari was filed by Geoffrey W. Barnard, Chairman of the Board of Bar Examiners of the Virgin Islands, on May 23, 1988. A petition was also filed by the Virgin Islands Bar Association on June 6, 1988. Both petitions were granted on June 30, 1988, the

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[3] *Frazier* was decided after the decision of the district court was entered, and after oral argument before the circuit. Its applicability was first briefed at the request of the court of appeals after argument.

proceedings being consolidated by order of the Court. This brief is submitted jointly by both petitioners.

I. THE DISTRICT COURT OF THE U.S. VIRGIN ISLANDS IS SO GEOGRAPHICALLY AND FACTUALLY DISTINCT FROM FEDERAL COURTS OF THE MAINLAND UNITED STATES THAT APPLICATION OF THE SUPERVISORY POWER TO STRIKE ITS RESIDENCY RULE IS IMPROPER.

The decision below, rendered by a deeply divided circuit,[4] incorrectly treats this Court's opinion in *Frazier v. Heebe,* 107 S.Ct. 2607 (1987), as requiring that all federal courts, wherever located, and whatever their special circumstances, adhere to a single rule that residence may not be required for admission to the practice of law.

This Court's holding in *Frazier,* however, was considerably narrower than the court of appeals' decision below. *Frazier* held that the district court was not empowered to adopt its local rules to require members of the Louisiana state bar who apply for admission to the federal bar to live in, or maintain an office in, Louisiana where the court sits. 107 S.Ct. at 2613-14.

The *Frazier* Court began its analysis by expressly recognizing "that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business," and that this "authority includes the regulation of admissions to its own bar." The Court also noted that such rules must be "consistent with the principles of

[4] Eight members of the Court of Appeals for the Third Circuit joined the majority opinion. Five members dissented. Pet. App. 10a.

right and justice" and, of course, with the rules of practice and procedure established by the Supreme Court. 107 S.Ct. at 2611.

Examining the justification proffered for its rule by the Eastern District of Louisiana, the Court found neither necessity nor rationality on the evidence presented. While the Eastern District claimed its rule served the important objective of "the efficient administration of justice" because "proximity to the New Orleans courthouse" was "important when emergencies arise during proceedings", the evidence established that the applicant lived only 110 miles away, while lawyers residing in the state might live three times that distance from the court. The only difference between their plights was a state boundary crossing the nonresident's path. Obviously, the justification of the Louisiana rule could not rationally be tied to efficient judicial administration. 107 S.Ct. at 2613.

The second important reason for the rule cited by the Eastern District was the fear that nonresidents of the state would be "less competent" in matters of local law than residents. Again the lesser competence was not proven, especially since the applicant was a member of the Louisiana state bar, already practicing before the state courts. The court was "unwilling to assume that a nonresident-lawyer—any more than a resident—would disserve his clients by failing to familiarize himself [or herself] with the [local] rules." 107 S.Ct. at 2612.

The improbability of that assumption being true was heightened, in the Court's view, by the fact that the rule at issue was a federal trial court's rule. The Court noted that presumed lack of competence among nonresident at-

torneys was even more difficult to justify in the context of federal court practice than it was in the area of state court practice, "where laws and procedures may differ substantially from state to state. There is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries." 107 S.Ct. at 2612 n.7.

The *Frazier* Court did not say that efficient judicial administration was not an important and significant governmental interest. It did not say that encouraging availability and competence in local law are unnecessary or irrational goals. It said, instead, that those goals could not be shown to be advanced in any meaningful way by the Louisiana rule under those facts.

Compare the facts in the Virgin Islands with those in *Frazier* and an example of compelling justification emerges on the very points at which the Louisiana rule proved irrational and unnecessary. For the admittedly important goal of efficient judicial administration, the Virgin Islands presents a situation in which it is certain that residents are more readily available than nonresidents. Substantial difficulties in travel between the Virgin Islands, a tourist destination, and the mainland were emphasized by the district court. Pet. App. 64a-65a. Indeed, one living 110 miles from the courthouse in the Virgin Islands would have to be a resident of the high seas. Even dispatching notice of a hearing, whether by mail or telephone, is a dramatically more difficult problem in the Virgin Islands/mainland context than in the case

of jurisdictions within the continental United States.[5] While modern, virtually instantaneous, communications may be taken for granted in Washington, D.C. or New Orleans, in the Virgin Islands such communications are not dependable. In the words of the dissenting judge of the court of appeals below:

> I find it particularly disheartening that the distinguished federal judges of this Court have so easily written off as irrelevant their own experiences with the transportation and communication problems that plague the Virgin Islands. Even if only some members of this Court have had the frustrating experience of mailing case files to the Virgin Islands weeks before a sitting, only to learn that they are not available when they arrive to hear argument, or have had their judicial patience tested as they have waited for the connection of a phone call between the continental United States and the Virgin Islands, we should heed Chief Justice Taft's pointed observation that "[a]ll others can see and understand this. How can we properly shut our minds to it? *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20, 27, 42 S.Ct. 449, 450, 66 L.Ed. 817 (1922), quoted in *Gomillion v. Lightfoot*, 270 F.2d 594, 608 (5th Cir.

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[5] The district court noted in its opinion that mail delivery to the mainland often takes more than five days. Pet. App. 66a. Recently, congressional hearings initiated by Virgin Islands Delegate Ronald DeLugo revealed that only 65 percent of the first-class mail sent from the continental mainland to the territory is delivered within three days. Letters from almost 150 Virgin Islanders were accepted into evidence at the hearing and described the loss of business opportunities and credit as a result of the delay caused by the mail service to the Virgin Islands. The Postmaster General of the United States also agreed that the territory experienced serious problems with mail delivery. — Cong. Record — (July 14, 1988) (transcript of proceedings not yet available).

1959) (Brown, J., dissenting), *rev'd*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

Pet. App. 33a-34a.

Furthermore, the administrative burdens on the District Court of the Virgin Islands are extraordinary. There were, at the time of the decision below, only two federal judges in the Virgin Islands. Statistics gathered by the Administrative Office of the United States Courts for the year 1987 (the most recent available) indicate there were, on average, 466 pending cases per judgeship in the district courts of the United States, whereas in the Virgin Islands there were 628 pending cases per judgeship. **Administrative Office of the Courts, Federal Court Management Statistics**, 60, 167 (1987). This placed the Virgin Islands first in the Third Circuit, and first in the entire United States in number of pending cases per judgeship. *Id.* at 60. The territory thus has a massively disproportionate case load per judge to manage and conclude on a timely basis. Faced with this imposing judicial burden, the district court concluded that the residency rule was indispensable to any semblance of efficient judicial administration, given the extreme difficulties associated with travel and communication between the islands and the mainland. Pet. App. 65. Thus, while the goals and concerns of the Eastern District and of the district court in the Virgin Islands may be similar, the necessity and rationality of their rules as a method to achieve those goals is quite different.

Similarly, in the matter of competence in local law, the *Frazier* Court recognized the inequity in an assumption that nonresidents would be less diligent than residents in remaining knowledgeable in local law. In the

Virgin Islands, no such assumption is required. The evidence, uncontradicted, established that the local law of the territory is simply not available on a current basis to nonresidents. Jt. App. 45. The Virgin Islands' limited budget and small court and legislative staffs, lead to long delays in publication of statutes, regulations and opinions, except for photocopies in the district court library and senate chambers. Even the most conscientious nonresident could not routinely fly to the territory to do research.[6] Unlike the rule of the Eastern District, the Virgin Islands District Court rule does not exclude persons already members of a state bar, practicing before state courts, thereby demonstrating their competence in local law. The Virgin Islands Bar is integrated, V.I. Code Ann. Tit. 5 App. V Rule 51(a) (1982), and the district court's rule controls all admissions to practice on a uniform basis. On the issues examined in *Frazier*, the Virgin Islands is as far removed from the factual setting there described as it is from the state of Louisiana.

In addition to concerns about counsel availability as a substantial factor in the courts ability to efficiently manage its own calendar, and the ability of nonresident attorneys to maintain adequate familiarity with evolving Virgin Islands law, the district court noted other substantial concerns which are addressed by the Virgin Islands rule, which were not at issue in *Frazier*. These include the

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[6] Neither of the two major American computerized legal research databases, West Law and Lexis, include Virgin Islands Reports or the Virgin Islands Code. The case reporters and statutes of the other unincorporated territories are likewise excluded; except that West Law includes the insurance statutes of Guam in its database, designated GUIN-ST.

limited ability of the Virgin Islands Bar, a small association staffed entirely on a voluntary basis and operated on a very modest budget, to adequately supervise the ethics of a nationwide bar membership, and the unworkability of possible alternative means of securing communication with the court as mentioned in *Piper v. New Hampshire*, 470 U.S. 274, 286 n. 21 (1986). Pet. App. 65a, 67a. For example, the possibility of substituting telephone conferences for in person conferences with distant nonresidents is not a feasible alternative in a jurisdiction in which telephone communications are not reliable.

Of great concern to the lower court was the need of the Virgin Islands to sustain the defense of indigent criminal defendants by a requirement that all active members of the Virgin Islands Bar share the responsibility to provide representation to this group with only nominal payment. As the court pointed out, the Virgin Islands by rule requires all members of the bar to share this responsibility. Pet. App. 66a. *See also,* V.I. Code Ann. Tit. 5 App. V Rule 16(a) (1982) (reprinted at Pet. App. 75a.). At the district court level this involves approximately four appointments a year, requiring the attorney to meet with his client, appear for calendar calls, arraignments, pretrial motion proceedings, and, of course, trial. Jt. App. 44. (affidavit of Patricia D. Steele). For a nonresident to adequately fulfill this responsibility to a criminal defendant incarcerated in the Virgin Islands, in the view of the district court, would be unworkable. Pet. App. 66a. All of the previously mentioned obstacles, including problems in securing travel arrangements and telephone communications, would tend to inhibit proper representation. In the opinion of the district court, since the rule required that

appointed counsel confer with his client at his place of incarceration within five days of the order, and since mailing frequently takes more than five days to the continental United States, it is virtually impossible to imagine nonresidents meeting their obligations under this rule. *Id.* Without a doubt, such nonresidents would seek exemption from this responsibility which is borne by all resident members of the bar.[7]

Obviously, compliance with the mandate of the Speedy Trial Act, 18 U.S.C. § 3161 (1982), is an important governmental goal, as is fulfilling the obligation to secure adequate counsel to all persons charged with crimes. *Gideon v. Wainwright,* 372 U.S. 335, 343 (1963) (holding that the right to the assistance of counsel, as guaranteed by the Sixth Amendment, is necessary to insure the fundamental human rights of life and liberty). In the Virgin Islands the local government and the courts have long concluded that the only way this obligation can be met is by calling upon all active members of the bar to share the responsibility with the small public defenders office. If the residency requirement were forbidden, either nonresidents would be forced to take their equitable share of such appointments, thereby increasing the risk that indigent defendants whom they were appointed to represent would experience substantial delays in their ability to confer with counsel and other detriments, the court would risk

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[7] Indeed, the applicants here contended before the Third Circuit that this rule, requiring universal representation of indigent criminal defendants, should also be stricken as to nonresident attorneys, because it would be too burdensome for them to share this responsibility. The circuit did not reach this issue but remanded it to the district court for "further consideration." Pet. App. 8a n.4.

possible sanctions under the Speedy Trial Act including dismissal of otherwise meritorious charges, or nonresidents would be permitted to practice as a special elite class, not sharing this responsibility with their resident counterparts.[8] Whatever may have been intended by the decision in *Frazier v. Heebe,* it cannot be seriously contended that a system in which nonresidents are given preference and advantage over residents in the practice of law would constitute a rule consistent with "the principles of right and justice."

Prior to the *Frazier* opinion, the Third Circuit had long held the Virgin Islands' geographic isolation and other special circumstances led to a series of consequences for the courts and the bar which constituted substantial reasons to exclude nonresidents from the practice of law in the islands. *Aronson v. Ambrose,* 479 F.2d 75 (3d Cir.), *cert. denied,* 414 U.S. 854 (1973). The court had recognized in *Aronson* that

> . . . as a practical matter the Virgin Islands may be reached from the mainland only by travel on limited and, frequently, congested airlines. The case load of the district court is continually increasing and it would be intolerable if the court were compelled to defend, even in part, on lawyers living and practicing on the mainland more than a thousand miles away to answer urgent motion calls, attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants.

479 F.2d at 78.

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[8] The obligation to serve as defense counsel for indigents, both in the district court and the territorial court, as well as the duty to serve on appointment as counsel to indigent parties in the family court, are not voluntary "pro bono" services in the Virgin Islands, but are a mandatory part of each admitted attorney's practice. Pet. App. 65a-66a.

The possible effects of such a judicial collapse upon an island community already struggling with one of the highest per capita crime rates in the nation, is a substantial reason for the rule.[9]

Additionally, all admitted Virgin Islands lawyers are required to share the duty to provide representation to abused children, juvenile delinquents, and certain other categories of persons in the territory's family court, on a rotating basis. V.I. Code Ann. Tit. 5 §§ 2505 and 2542 (Supp. 1987). Consequently, the residency requirement in this territory is deeply and inextricably entwined with the islands' efforts to meet their obligations to those whom moral duty and the Constitution demand receive fair legal representation.

In the decision below the Third Circuit did not reverse *Aronson.* Indeed, the majority opinion did not conclude that the Virgin Islands residency requirement was no longer founded on the same substantial reasons which the court had previously recognized. Rather, it concluded that *Frazier* mandated the exercise of its supervisory

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[9] According to the **U.S. Department of Commerce, Statistical Abstract of the United States, 1988** (10th ed 1988) the per capita income in the U.S. Virgin Islands is lower than the per capita income among all 50 states. Moreover, statistics maintained by the FBI in the Uniform Crime Reports for the year 1984 indicate that the Virgin Islands has the highest per capita felony crime rate in the United States. **U.S. Department of Justice, Crime in the United States** (1985). The high crime rate, coupled with a relatively low per capita income, results in the high level of indigency among criminal defendants previously mentioned and the particularly heavy demand on the district court to expeditiously move the criminal calendar. This judicial burden is by necessity, in view of the limited size of the public defenders office, translated into special responsibilities on the part of all practicing members of the Bar.

power to void the residency rule, Pet. App. 8a, apparently without regard to whether that rule, in the context of a remote territory, is justified by substantial reasons.[10]

This Court's opinion in *Frazier*, however, did not mandate such a result. The test there applied, which the Louisiana rule failed, was not a *per se* rule against residency requirements. Instead, it was a test of necessity and rationality. 107 S. Ct. at 2612. The Court concluded that in the circumstances there presented, the Eastern District's residency rule lacked both. For one of the circuit courts now to expand the *Frazier* holding into a system-wide absolute prohibition on residency requirements would be to deny the unincorporated territorities the flexibility to cope with the peculiar circumstances of their districts.

The particular circumstances affecting the practice of law in the Virgin Islands all begin with the geographical isolation of the small island group: lack of reliable, readily available transportation to and from the mainland, difficulty in document transmittal, and telecommuni-

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[10] The court of appeals explained:

> . . . we are convinced that the Supreme Court of the United States did not invoke its supervisory power merely to adopt an ad hoc rule for the resolution of the problem presented. . . . We conclude that *Frazier* must be viewed as generally applicable to the United States district courts. We have no doubt, therefore, that it is binding precedent here unless the status of the District Court of the Virgin Islands dictates otherwise.

Pet. App. 7a.

cations deficiences, rendering alternative means of legal intercourse undependable.[11]

The factual circumstances which distinguish the Virgin Islands do not stop there. In the Virgin Islands the legal practioner must study anew which provisions of the United States Constitution apply, what the jurisdiction of a district court includes, and whether federal statutory law is applicable to the territory.[12]

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[11] Affidavits filed with the district court by examiners of the Virgin Islands Bar stated, *inter alia, that* (1) "particularly during what is locally referred to as 'the tourist season' between December and April, reservations may be totally unavailable for commercial flights," (2) "[i]t is often difficult to secure a long distance [telephone] connection to a distant point, or to maintain a fully audible converation without interference from static, voice fade outs, transmission gaps, or disconnections," and (3) "[m]ail delivery is often unreliable and almost always involves material delay." Jt. App. 37. (affidavit of Geoffrey Barnard). Similarly, the President of the Virgin Islands Bar Association stated that, "while telecommunications between the Virgin Islands and the Continental United States have improved substantially in the last decade, they remain erratic and conversations are frequently impaired by static, echoes, transmission gaps and disconnections." Jt. App. 44. (affidavit of Patricia D. Steele). The Bar Examiners' affidavit also stated that "[t]he resources of the small Virgin Islands Bar could never accommodate a serious and adequate investigation into the professional competence . . . or the ethical standards of nonresident lawyers." Jt. App. 39-40. (affidavit of Geoffrey Barnard).

[12] The provisions of the United States Constitution do not all apply in the Virgin Islands. *See*, Revised Organic Act of the Virgin Islands of 1954 § 3, 48 U.S.C. § 1561. Neither is the jurisdiction of the District Court of the Virgin Islands the same as that of the district courts in the 50 states. *See*, Revised Organic Act of the Virgin Islands of 1954 § 23A, 48 U.S.C. 1612. Not all federal statutes apply to the territory. For example, the provisions of the Federal Arbitration Act are enforceable in the

(Continued on following page)

If the non-resident attorney seeking to practice in the islands did not find those circumstances undermined his ability to function effectively, he would encounter further difficulties resulting from linguistic differences between the mainland and the Virgin Islands.[13]

(Continued from previous page)

District Court of the Virgin Islands. *Econo-Car Int'l v. Antilles Car Rental, Inc.*, 499 F.2d 1391 (3d Cir. 1974). Much of the Federal Labor Law is not. 29 U.S.C. §§ 101, 113(d) (1982). *See also, International Longshoremen's and Warehousemen's Union CIO v. Wirtz*, 170 F.2d 183 (9th Cir. 1948), *cert. denied*, 336 U.S. 919, *reh'g denied*, 336 U.S. 971, *cert. denied*, 337 U.S. 915 (1949). Neither does the federal statute governing judicial disqualification apply to the District Court of the Virgin Islands, which "is not among the district courts enumerated in the Judicial Code, but, instead, is created by the Revised Organic Act of the Virgin Islands, . . . is given a different name and both the court and its judges possess attributes different from those of the Federal District Courts and district judges. . . ." *Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 931 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975)

[13] Cases in the Virgin Islands in which defendants have been permitted to retain stateside counsel *pro hac vice* have resulted in the need for the court to appoint an interpreter to translate the witness' West Indian dialect for the nonresident attorney. *See, Government of the Virgin Islands v. Gereau*, 502 F. 2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). In a proceeding against a defendant represented by a recently appointed public defender who had just moved to the islands from the mainland, on appeal, a post trial motion filed under 28 U.S.C. § 2255 (1982) required remand to the trial court where the defense counsel acknowledged during the trial that he was "only understanding about 30% of the witnesses' testimony." *Government of the Virgin Islands v. Blyden*, nos. 86-3346, 86-3372, 86-3409, slip op. at 14 (3d Cir. January 5, 1988). While failures in the judicial process due to inability to communicate effectively between counsel and client, or counsel and witness, are relatively uncommon in the reported cases (probably due to the relatively few attorneys practicing without having fully familiarized themselves with territorial dialects and pronunciation) these failures could become epidemic if residency was stricken from the requirements for practice.

For all these reasons, the residence requirement in the rules of the District Court of the Virgin Islands is both necessary and rational. The court of appeals in its majority decision failed to review the rule under that standard. Instead, it treated *Frazier* as having decided that neither availability of counsel for court proceedings or attorney competence in local law can be considered sufficiently important purposes to justify residence-related bar requirements. The overlooked analysis in *Frazier*, as the court of appeals sought to apply it here, was an examination of the facts and circumstances of the specific jurisdiction as they relate to the purposes sought to be advanced. A rule may be irrational and unnecessary in one setting but absolutely critical in another. Perhaps the court of appeals was led to believe that the Court intended a blanket prohibition on residency requirements in the federal courts by the unqualified language used in some portions of the *Frazier* opinion. However, a careful reading of the test there applied clearly indicates the Court's intention to prohibit only rules which are unnecessary and irrational, as the dissent below argued.

> Surely the *Frazier* "unnecessary and irrational" test, . . . does not articulate a *per se* rule against residency requirements. If anything, the instant case shows that there are wide regional differences within our federal court system. Thus, while *Frazier* recognized that federal district courts are part and parcel of a federal system in which "[t]here is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries," *Frazier*, 107 S.Ct. at 2612 n.7, it also left these courts with enough flexibility to cope with the peculiar circumstances of their districts. If *Frazier*

> provides any guidance to the instant case, it is that we may, not must, use our inherent supervisory power to strike down improper residency requirements. If we do invoke our supervisory authority, we must discern whether the challenged residency requirements are "unnecessary and irrational," *Id.* at 2612, by balancing our supervisory interest in preserving "the integrity of the federal system," *Id.* at 2612 n.7, against those competing interests articulated by the district court in support of the residency requirements.

Pet. App. 22a-23a.

This appeal squarely presents the issue whether *Frazier* was intended to invalidate all residency requirements, or to prescribe a test for validity. The applicants argued before the court of appeals that *Piper* and *Frazier* invalidated all bar residency requirements. The dissent below urged that the decisions cited be read as imposing a fact-based test.[14] The circumstances of the courts of the United States Virgin Islands fully justify the residency requirement of the district court, and court of appeals' decision here should be reversed.

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[14] As the dissent noted:

> [a]t argument appellants Esposito and DeVos pointed to Justice White's concurring opinion in *Piper*, 470 U.S. at 288-89 (White, J., concurring), as support for their assertion that *Piper* and *Frazier* invalidated residency requirements wholesale. The Virgin Islands Bar Examiner, on the other hand, noted that, at the time of the Court's decision in *Frazier*, there were two dozen federal district courts that had residency requirements. *Frazier*, 788 F.2d at 1054 n.7. These requirements were not explicitly invalidated by the Supreme Court, and I believe that their current vitality is an open question.

Pet. App. 22a n.9.

II. THE DISTRICT COURT OF THE VIRGIN ISLANDS IS LEGALLY AND CONSTITUTIONALLY DISTINCT FROM OTHER LOWER FEDERAL COURTS, AND INVALIDATING ITS RULES OF PRACTICE UNDER THE SUPERVISORY POWER IS IMPROPER.

In treating *Frazier* as requiring the use of the supervisory power to strike the Virgin Islands residency rule, the court of appeals failed to recognize the significant legal distinctions between the Eastern District's rule in *Frazier* and the rule at issue here which is promulgated by the district court but which also applies to the territorial courts.

In the case of the unincorporated territories, the Constitution expressly gives to the Congress the power to "make all needful Rules and Regulations," U.S. Const. Art. IV Sec. 3, cl. 2. Under this power, Congress had, until 1984, given to the District Court of the Virgin Islands, created by federal law, the authority to prescribe the rules of "practice and procedure of the inferior courts" of the territory, created by local law, Revised Organic Act of the Virgin Islands of 1954 § 21(b), 48 U.S.C. 1611 (b), as well as "the duties of the judges and officers" thereof, together with a substantial additional series of judicial matters. Revised Organic Act of the Virgin Islands of 1954 § 23, 48 U.S.C. § 1613. The district court was, by the same act, directed to apply the Federal Rules of Civil Procedure, including those rules governing admiralty and bankruptcy. *Id.* This special statutory grant implied the intent of Congress to confer on the federal court in the territory the responsibility and the right

to develop rules of practice particularly suited to the needs and circumstances of that jurisdiction. Revised Organic Act of the Virgin Islands of 1954, 48 U.S.C. §§ 1541-1645 (1982). In 1984, the law was amended by Congress to grant the power to prescribe rules of practice in the territorial courts to those courts or the local legislature. Revised Organic Act of the Virgin Islands of 1954 § 21, 48 U.S.C. § 1611. This allocation and reallocation of authority to prescribe the rules of practice in the territory's courts clearly constitutes a congressional determination to permit locally determined rules suited to the territory's special needs. In the face of this constitutional and statutory history, to hold that the Virgin Islands must be swept into a uniform national rule of admission to practice is to disregard the congressional allocation of authority.

The court of appeals' excessively broad reading of *Frazier* treats the unincorporated territories as if they were legally indistinguishable from the contiguous states. It also ignores the unique and politically necessary jurisdictional hybrid which the federal district courts in the territories are, as if their jurisdiction and governing law were like the federal courts of Louisiana, simply an integrated part of the standardized system of judicial units applying a uniform "specialized federal law," requiring a "mobile" and "specialized" federal bar.

In contrast, the federal courts of the Caribbean and certain of the Pacific territories have been crafted by Congress under its Article I powers to function only in part as federal trial courts but also in other ways. For example, the District Court of the Virgin Islands Appellate Division is the court of appeals for the territorial

courts. Revised Organic Act of the Virgin Islands of 1954 § 23A, 48 U.S.C. § 1613a. It has concurrent jurisdiction in civil matters where as little as $500.00 is at issue. Revised Organic Act of the Virgin Islands of 1954 § 22, 48 U.S.C. § 1612. It has concurrent jurisdiction, too, in all criminal matters in which the maximum penalty exceeds a fine of $100.00 and imprisonment for six months, whether the offense is federal or territorial. Revised Organic Act of the Virgin Islands of 1954 § 22(b), 48 U.S.C. § 1612(b). *See also,* Revised Organic Act of Guam, 48 U.S.C. § 1424 (establishing jurisdiction of the District Court of Guam); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Art. IV, Pub. L. 84-241, 90 Stat. 263 (reprinted in note following 48 U.S.C.A. 1424 (Supp. 1988)) (establishing jurisdiction of the District Court of the Northern Mariana Islands).

Of course, the District Court of the Virgin Islands is a court "established by Act of Congress," and it enjoys the authority to "prescribe rules for the conduct of [its] business" under 28 U.S.C. § 2071, as do the district courts of the United States; but it is not a constitutional court. *Government of the Virgin Islands v. Bell,* 392 F. 2d 207 (3d Cir. 1968). The fact that federal law has granted to the District Court of the Virgin Islands the jurisdiction of a United States district court over causes arising under the Constitution, treaties and laws of the United States does not make the territorial court "a United States district court." *Ottley v. DeJongh*, 149 F. Supp. 75 (D.V.I. 1957).

Until October 5, 1984, not only the rules of practice of the district court, but also "the rules governing the practice and procedure of the inferior courts, and pre-

scribing the duties of the judge and officers thereof, oaths and bonds, the times and places of holding court, and the procedure for appeals to the district court . . . [were] established by the district court." Revised Organic Act of the Virgin Islands of 1954 § 21(c), 48 U.S.C. § 1611(c). With the enactment of Pub.L. 98-454, 98 Stat. 1737, in 1984, the lower courts were authorized to promulgate their own "rules governing practice and procedure," but they have not in fact done so, adhering to the rules of practice established by the district court, as the highest court of the territory. Thus, the rules of practice of the district court are the rules of admission for the Virgin Islands courts as a whole.

Neither do the district courts of the unincorporated territories offer to litigants the same range of Constitutional guarantees as do the federal courts elsewhere, and this discrimination has long been upheld. *Rivera v. Government of the Virgin Islands,* 375 F.2d 988 (3d Cir. 1967) (holding the right to presentment by grant jury is not guaranteed in the unincorporated territories.). *Accord, United States v. Canel,* 708 F.2d 895 (3d Cir.), *cert. denied sub. nom., Figueroa v. United States,* 464 U.S. 852 (1983) (holding the right to trial in federal court before a judge granted life tenure does not apply to the unincorporated territories); *Government of the Canal Zone v. Scott,* 502 F.2d 566 (5th Cir. 1974); *United States v. Montanez,* 371 F.2d 79 (2d Cir.), *cert. denied,* 389 U.S. 884 (1967). In sum, the federal courts in the territories have a judicially sanctioned tradition of distinction from the federal norms, and this tradition had been endorsed by the Third Circuit until *Frazier.*

While this Court may construe its powers under section 2072 of Title 28 of the United States Code as including the authority to prohibit local district court rules of practice which are "irrational and unnecessary," the local rule in effect in the Virgin Islands stands in a unique position serving as a rule of practice not merely for a federal trial court but for the territorial court system as a whole. This rule, in the context of a court so legally and constitutionally unlike the other federal district courts, should not be eradicated by a single nationwide ruling of uniformity. In the Virgin Islands, the judicial divisions "comprised of islands and cays," Revised Organic Act of 1954 § 25, 48 U.S.C. 1615, have a statutory and constitutional framework as different from the federal courts of the states as their geographical site is from the contiguous states. Like those geographical differences, the legal and constitutional differences require recognition that the District Court of the Virgin Islands has a special congressionally granted role in the formulation of territorial rules of practice and procedure. If the Court would not consider it appropriate to invalidate such a rule promulgated by a state supreme court, it would not be appropriate to do so here.

III. THE UNINCORPORATED TERRITORIES SHOULD BE ALLOWED THE FLEXIBILITY TO DEVELOP THEIR OWN RULES OF PRACTICE, ADAPTED TO THEIR CULTURAL ENVIRONMENT, UNLESS THOSE RULES ARE INESCAPABLY WRONG.

Particularly in the unincorporated territories, under the political umbrella of United States citizenship but not destined for statehood, linguistic, historical and other cultural distinctions render the people and their laws profoundly unique to the American experience. This cultural and historical disparity has led this Court in the past to

recognize the importance of treating the territories with special deference. For example, in the case of the Commonwealth of Puerto Rico (no longer an unincorporated territory, but having a similar legal and historical relationship) this Court has said:

> The relations of the federal courts to Puerto Rico have often raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal courts, reversing Puerto Rican courts, were inclined to construe Puerto Rican laws in the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this Court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be "inescapably wrong." *Bonet v. Texas Co.*, 308 U.S. 463, 471.

Fornaris v. Ridge Tool Co., 400 U.S. 41, 42-43 (1970).

Similarly, the Territory of Guam has been recognized as entitled to special deference in its legal relationship to the higher courts of the United States:

> The District Court of Guam serves in two distinct capacities. It can act as a Federal District Court. The District Court of Guam sitting as the Appellate Division also functions as a local territorial appellate court, the jurisdiction of which is determined exclusively by the Guam legislature. 48 U.S.C. § 1424(a). Since we are required to give a high degree of deference to territorial courts' determinations of local law, we must affirm a decision of the Appellate Division "on a matter of local law, custom or policy if the decision is based upon a tenable theory and is not inescapably wrong or manifest error." *Schenck v. Gov't of Guam*, 609 F.2d 387, 390 (9th Cir. 1986); *Accord People of the Territory of Guam v. Yang*, 800 F.2d 945, 946 (9th Cir. 1986); *Electrical Construction & Maintenance Co. v. Maeda Pacific Corp.*, 764 F.2d 619, 620 n.1 (9th Cir. 1985); *Laguana v. Guam Visitors Bureau*, 725 F.2d 519, 520 (9th Cir. 1984); *Chase Manhattan Bank v. Gems-by-Gordon*, 649 F.2d 710, 712 (9th Cir. 1981)

Aguon v. Calvo, 829 F.2d 845 (9th Cir. 1987).

While the issue before the courts in *Fornaris* and *Aguon* was one of statutory interpretation, the policy of deference to a territorial court's determination on matters of custom and policy in judicial administration is equally justified. *Accord, People of the Territory of Guam v. Fejeran*, 687 F.2d 302 (9th Cir. 1982), *cert. denied*, 460 U.S. 1045 (1983).

Like the people of Puerto Rico and Guam,[15] the people of the Virgin Islands share a non Anglo-Saxon ancestry. Their colonial past includes cultural and linguistic imprints of Danish, African, French, Dutch, and Spanish origin,[16] and their modern culture is deeply affected by

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[15] The federal district courts of Puerto Rico require as a condition of the right to practice law, that applicants pass a three day bar examination conducted entirely in Spanish. While that rule might be "irrational or unnecessary" for the practice of law before the ditrict courts of the United States in most locations, in Puerto Rico the rule has obvious and rational objectives.

[16] *See*, **D. Taylor, Languages of the West Indies** 250-51 (1977) (listing various English words and their translations into Dutch Creole spoken in St. Thomas and St. John, United States Virgin Islands); **L. Emanuel, Surviving Africanisms in the Virgin Islands English Creole** 9-11 (1972) (explaining that the dialect known as Dutch Creole spoken in the Virgin Islands is a mixture of European languages and native tongues of Africa); **R. Hall, Jr. Pidgin and Creole languages** 12, 16 (1969) (explaining that varieties of pidginized English and Dutch are spoken in the Virgin Islands).

their identity as an island community in the West Indies. This results in a need for respectful acknowledgment that not every traditional American viewpoint is necessarily well suited to the needs and values of the people of the territory, and the same deference this Court has found warranted in the case of Puerto Rico should also be accorded the Virgin Islands.

The Virgin Islands residence rule, then, should not be stricken unless the adoption of that rule by the District Court of the Virgin Islands is "inescapably wrong." The Third Circuit, however, failed to apply that appropriate standard of deference to the District Court of the Virgin Islands, and its decision here should be reversed.

IV. THE VIRGIN ISLANDS RESIDENCY REQUIREMENTS DO NOT VIOLATE CONSTITUTIONAL STANDARDS.

The court of appeals did not find the Virgin Islands residency requirements to be constitutionally infirm. Instead, it felt compelled by the Court's ruling in *Frazier v. Heebe*, 107 S.Ct. 2607 (1987) to apply its supervisory power and invalidate those requirements, thus not reaching the constitutional issue. Pet. App. 8a-9a. However, in *Frazier*, the Court noted that while its supervisory power over federal courts allows it to protect the federal system, "its authority over state court bars is limited to enforcing federal constitutional requirements." 107 S.Ct. at 2612 n.7.

Because of the Virgin Islands' unique status and location, more fully described in section II of this brief, the courts of the Virgin Islands are more reasonably subject

to the standards applied to the state courts than to those applied to the federal district courts. Accordingly, the circuit court should have applied, as did the district court, federal constitutional standards to the review of the territorial rule.

In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), it was established that a nonresident who passes a state bar examination, and is otherwise qualified to practice law, has an interest in practicing law that is protected by the Privileges and Immunities Clause of Article IV, Sec. 2 of the United States Constitution. The Court noted, however, that the protection afforded by the clause is not absolute and does not preclude discrimination against nonresidents where there is a substantial reason for the difference in treatment and the discrimination bears a close relation to the state's objective. *Piper*, 470 U.S. at 284 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)). These principles were recently affirmed in the case of *Supreme Court of Virginia v. Friedman*, 56 U.S.L.W. 4669 (U.S. June 21, 1988) (1988 U.S. Lexis 2746).

Applying the *Piper* standards to the Virgin Islands[17], the district court, in granting summary judgment to the Bar Examiners and to the Bar, concluded that the territory's residency requirements do not violate the Privileges and Immunities Clause. The district court found that the territory's geographic isolation and the attendant difficulties in transportation and communication justify the residency requirements. Pet. App. 67a. Specifically, the

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[17] The district court's opinion preceded the Court's decision in *Supreme Court of Virginia v. Friedman*, 56 U.S.L.W. 4669 (U.S. June 21, 1988).

district court found that all of the factual circumstances described above in relation to the *Frazier* test, which qualify the Virgin Islands rule as necessary and rational, were "substantial reasons" justifying the difference in treatment in the territory between residents and nonresidents. Those same circumstances establish a substantial relationship between the rule and the territory's important objectives previously discussed in section I of this brief.

In applying the constitutional test to the residency rule in *Piper,* the Court specified that there was no evidence to support the state of New Hampshire's claim that nonresidents would be "less likely to keep abreast of local rules and procedures." 470 U.S. at 285-86. Neither was there any justification for the assumption that nonresidents would be less ethical than resident lawyers. While the Court agreed that nonresidents might at times be "unavailable for court proceedings . . . [or] pretrial hearings . . . held on short notice . . ." it assumed "that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues [would] reside in places reasonably convenient to [the state]." 470 U.S. at 286-87. For distant nonresidents, the court noted a less restrictive but valid rule could require the distant lawyer to retain a local attorney to be available for unscheduled matters. Finally, the Court rejected as unfounded the assumption that nonresidents would be "disinclined to do their share of *pro bono* and volunteer work." 470 U.S. at 287.

In contrast, as the discussion set forth above in section I explains, neither those judicial assumptions nor the facts in the New Hampshire/Vermont situation apply to

the Virgin Islands. The District Court of the Virgin Islands found that nonresidents would not fail to keep abreast of local law because they were less conscientious or responsible but because they simply lacked practical access to current Virgin Islands law. Pet. App. 65a. The district court did not assume nonresidents were any less ethical or honest than resident lawyers, but rather that the very small Virgin Islands Bar, having limited resources, could never adequately monitor a nationwide membership. Pet. App. 67a. As to availability for court proceedings, the Court's assumption in *Piper* that the nonresident lawyers most likely to seek admission would be residents of reasonably convenient locations was not applicable in the instant case. The clear evidence in this case involving a remote island jurisdiction demonstrated there is not a reasonably convenient place of residence for nonresidents. Indeed, by definition all nonresidents of the territory would be residents of distant places. Since the Virgin Islands allows *pro hac vice* admissions for nonresidents, so long as they retain local counsel, the alternative identified in *Piper* as a permissible "less restrictive rule," is already in place in the Virgin Islands. Moreover, the Virgin Islands court identified certain other overriding problems of judicial administration, including a very small judiciary and an exceptionally heavy case load, which necessitate high efficiency in the processing of case loads inconsistent with interruptions or delays to accommodate nonresidents. Pet. App. 65a. Finally, the Virgin Islands' need for all lawyers to share the duty to represent indigent criminal defendants is not merely a concern about whether nonresidents will be good citizens or charitable in character. It is a concern about a carefully con-

structed and critically important system of mandatory legal obligations, presently shared by all who enjoy the right to practice law in the territory, which the district court concluded would be absolutely unworkable with nonresidents.[18]

On all counts then, as more fully detailed in section I, the Virgin Islands rule survives scrutiny under *Piper*. The applicants, however, urged below that while the Virgin Islands rule may be based on substantial reasons, especially insofar as it provides representation to indigent defendants, there are less restrictive means for achieving those goals.

They propose (1) "assigning . . . cases to [resident] attorneys who have become members of a pool of criminal defense attorneys by virtue of their experience and willingness to participate." Pet. App. 30a. This proposal, however, makes the startling assumption that experienced trial lawyers in the Virgin Islands would voluntarily take on the duty to represent all the indigent defendants in the territory now represented by the bar as a whole, at the nominal rate allowed by law for such service, a rate which barely exceeds the going salary for the legal secretary required to type their pleadings. *See,* 18 U.S.C. § 30006A (d). Absolutely no evidence was presented below that such an upwelling of desire to increase their service over its already substantial level exists among Virgin Islands lawyers.

Applicants' second "less restrictive" suggested rule was to require nonresidents to associate with resident

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[18] The *Piper* court did not imply that mandatory legal *pro bono* work was beyond the authority of the state bars.

attorneys, the latter presumably to fulfill their nonresident colleagues' duty under Rule 16. Even if some resident lawyers could be found who were willing to double their share of such duties, however, the Rule as written was designed to insure that "*all* lawyers who benefit from being members of the Virgin Islands bar share equally and directly in the responsibility of representing indigent criminal defendants." Pet. App. 31a.

Alternatively, applicants propose that the resident bar's trust accounts could be made to bear interest to pay the cost of funding indigent representation or that nonresidents could be assessed a special fee for this purpose. Pet. App. 30a. Besides ignoring the purpose of the rule already cited, these suggestions either place the cost of the nonresidents' duty on resident lawyers or assume the assessment of a tremendous annual fee on nonresidents, a step which would be debatable as to the degree of restrictiveness.

For all these reasons, the Virgin Islands rule, unlike the New Hampshire rule examined in *Piper,* is fully consistent with the Privileges and Immunity Clause.

Neither is the rule here inconsistent with the Court's evaluation of the rule presented in *Supreme Court of Virginia v. Friedman.* In *Friedman,* Virginia's justification for its residency requirement for attorneys seeking admission "on motion," that is without taking Virginia's bar examination, was that attorneys admitted on motion would not have the same commitment to service and familiarity with Virginian law that is possessed by applicants securing admission upon examination. Further, it reasoned that the residency requirement facilitated enforce-

ment of Virginia's full time practice requirement. 56 U.S.L.W. at 4671.

In rejecting Virginia's arguments, the Court stated, "the question is whether lawyers who are admitted in other States and seek admission in Virginia are less likely to respect the bar and further its interests solely because they are nonresidents." *Id.* In Virginia's case, because of its additional full time practice requirement, the court found no reason to assume that nonresident attorneys seeking admission to the bar on motion "will lack adequate incentives to remain abreast of changes in the law or to fulfill their civic duties." *Id.*

While recognizing that the state can be justifiably concerned with ensuring that its attorneys keep abreast of legal developments, the court suggested that these concerns might be satisfied by requiring mandatory atttendance at periodic continuing legal education courses. Also, it was suggested that the state's interest that the nonresident bar member does his or her share of volunteer and pro bono work could be met by requiring that a "nonresident bar member, like the resident member, could be required to represent indigent clients and perhaps to participate in formal legal aid work." *Id.* (citing *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985)). In *Friedman,* the Court held that Virginia had failed to make a showing that its discrimination against nonresidents bore a close relation to the achievement of substantial state objectives.

In the instant case, for all the reasons discussed in relation to *Piper,* including the distant location of the Virgin Islands from the United States mainland, the district

court properly found that the discrimination against nonresidents applying for bar membership did bear a close relation to the achievement of the territory's objectives that its bar members do their share of mandatory criminal defense of the indigent, as well as pro bono work, appear promptly for all judicial proceedings, and remain abreast of changes in the law of the Virgin Islands. Pet. App. 67a.

It is unrealistic to expect that attorneys living thousands of miles from the Virgin Islands could adequately represent indigent defendants or otherwise perform the pro bono work required of bar members in the territory. Moreover, again because of the great distances involved, it is also unrealistic to expect the nonresident lawyers to participate significantly in extremely limited local continuing legal education courses and other bar association activities, as well as participate in other civic duties in the Virgin Islands.

In summary, the district court by summary judgment decided that the Virgin Islands residency requirements do not violate federal constitutional standards. Likewise, the circuit court made no finding of constitutional infirmity. Unless the court establishes a blanket prohibition against bar residency requirements, which it has thus far declined to do, the record supports the findings of constitutionality.

CONCLUSION

For the foregoing reasons, petitioners, Geoffrey W. Barnard, in his capacity as Chairman of the Committee of Bar Examiners, and the Virgin Islands Bar Association, submit that a majority of the United States Court of Appeals for the Third Circuit has given *Frazier v. Heebe* too broad an interpretation. Petitioners therefore urge this court to enter judgment reversing the decision of the United States Court of Appeals for the Third Circuit below.

DATED: August 15, 1988

Respectfully Submitted,

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RESPONDENT'S

BRIEF

QUESTION PRESENTED*

Was the court of appeals correct in invalidating a district court rule requiring that lawyers reside in the Virgin Islands in order to be licensed to practice law there?

*In addition to the parties identified on the cover, the Government of the Virgin Islands filed a brief as *amicus curiae* supporting petitioners in the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1939 and 87-2008

GEOFFREY W. BARNARD, Chairman of the
Committee of Bar Examiners of the Virgin Islands,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN and LLOYD De VOS,
Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN and LLOYD De VOS,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

At issue here is a rule of the District Court of the Virgin Islands which requires members of that court's bar to reside in the Islands for one year before their admission and to continue to reside there afterwards. The court of appeals invalidated this rule under *Frazier v. Heebe*, 107 S. Ct. 2607 (1987), where this Court, in an exercise of its supervisory authority, struck down a similar federal district court rule. The decision below should be affirmed because *Frazier* is controlling

and also because the rule is unconstitutional under *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which invalidated a similar state court rule under the Privileges and Immunities Clause of Article IV.

STATEMENT OF THE CASE

A. *The Applicable Rule.*

The District Court of the Virgin Islands (the "District Court") was created by Congress in a statute now known as the Revised Organic Act of 1954 (the "Organic Act"), 48 U.S.C. §§ 1541-1645, which is the basic charter for the Islands. District Court judges are appointed by the President, with the advice and consent of the Senate, to ten year terms, 48 U.S.C. § 1614, and the District Court operates as a hybrid court. Although it was created under Article I of the Constitution, rather than Article III, it has jurisdiction over the kinds of cases heard by federal district courts. 48 U.S.C. § 1612(a). It also shares jurisdiction with the Territorial Court of the Virgin Islands (a trial court created by the Virgin Islands Legislature, 4 V.I. Code Ann. §§ 71-88) over various civil and criminal cases arising under territorial law. 48 U.S.C. § 1612(b). Finally, the District Court hears appeals from decisions of the Territorial Court, and the United States Court of Appeals for the Third Circuit hears appeals from cases which originate in District Court and those which are appealed to District Court from the Territorial Court. 48 U.S.C. § 1613a. *See* Appendix to Petition for Certiorari in No. 87-1939 ("Pet. App.") at 68a-73a.

Requirements for admission to the District Court bar appear in local Rule 56(b). 5 V.I. Code Ann., App. V., R. 56(b)(Pet. App. 78a). An applicant must take a two-day bar examination, as there is no way of being admitted on motion.

Apart from the usual character and educational requirements that appear in bar admission rules, an applicant must also "allege and prove to the satisfaction" of the Committee of Bar Examiners that he or she has "resided in the Virgin Islands for at least one year immediately preceding his proposed admission to the Virgin Islands Bar," and that if admitted to practice, he or she "intends to continue to reside in and to practice law in the Virgin Islands." Rule 56(b)(4) and (5)(Pet. App. 78a). A lawyer who moves out of the Islands becomes an "inactive" bar member and can revert to "active" status only upon his or her return (J.A. 40). The District Court is the only court which licenses people to practice law in the Virgin Islands. Thus, a lawyer who cannot be admitted to its bar is denied a license not merely to litigate federal cases, but to practice law in any fashion there.

B. *District Court Proceedings.*

This case began in the spring of 1985, shortly after this Court's decision in *Piper*, when respondents applied to take the Virgin Islands bar examination scheduled for 31 July and 1 August 1985. Respondents practice law in New York City, and both are members in good standing of the New York and New Jersey bars. Neither respondent lives in the Virgin Islands, and their applications were rejected for that reason by petitioner Geoffrey W. Barnard, the Chairman of the Committee of Bar Examiners (J.A. 22-25, 30-31).

On 14 June 1985, respondents filed suit in the District Court of the Virgin Islands, asking that the residence requirements in Rule 56 be declared unconstitutional and their enforcement enjoined under the Privileges and Immunities Clause of Article IV of the Constitution, which Congress applied to the Virgin Islands in the Organic Act, 48 U.S.C. § 1561 (J.A.14-17). On

21 June 1985 the District Court allowed respondents to take the bar examination (which they both passed), while reserving a decision on the merits (J.A. 26-27).

Both sides moved for summary judgment, and petitioner Virgin Islands Bar Association (the "Bar Association") was allowed to intervene and to join Barnard's motion (Pet. App. 62a-63a n.5). The arguments for and against this rule tracked those made in *Piper*, which struck down a similar restriction that was also said to promote lawyer competence, ethics, availability for court appearances, and willingness to do *pro bono* work. 470 U.S. at 285-87. The parties also debated the adequacy of airline and telephone service to the mainland, which the Third Circuit cited in a 1973 decision which upheld the Virgin Islands' continuing residence requirement against an equal protection challenge. *Aronson v. Ambrose*, 479 F.2d 75, *aff'g* 9 V.I. 254 (D.V.I. 1972), *cert. denied*, 414 U.S. 854 (1973).

For example, respondent De Vos stated in an affidavit that he is a partner with a lawyer in a Virgin Islands law firm and that his responsibilities require him to travel frequently to the Islands and to communicate between the mainland and the Islands, as well as elsewhere in the world, on a regular basis (J.A. 32). He stated that he had travelled to the Islands 20 times in the preceding 18 months "on virtually every day of the week and nearly every month of the year," including the winter "tourist season," and that he had used the New York gateway, as well as Miami and San Juan; during this time, "I have never been unable to secure a reservation on a commercial flight for the day I desired to travel, even when I made my reservations on the day of or on the day before my intended travel date" (J.A. 32-33).

To buttress these statements, De Vos noted that the Virgin Islands are served by four major airlines (American, Eastern,

Pan American and Midway Express). During the tourist season they offer seven to nine flights daily in each direction, with five or six daily flights during other times of the year (J.A. 33). In addition to this non-stop service, one-stop service is available to a number of mainland cities through San Juan, Puerto Rico, which has at least a dozen daily flights to New York, Newark, Chicago, Philadelphia, Atlanta, Boston, St. Louis, Miami and Baltimore. Six commuter airlines provide this connecting service, and the St. Thomas-San Juan market is one of the five busiest commuter routes in the United States in terms of the number of passengers carried and the number of flights offered, with the St. Croix-San Juan market consistently among the top ten markets as well (*id.*).

De Vos stated that telephone communications from the mainland to the Islands are "at mainland standard," citing his twice-daily calls to the Islands when he is on the mainland and his 12 calls a day to the mainland and foreign countries when he is in the Islands (J.A. 33-34). He added that his St. Thomas office has Wide Area Telephone Service ("WATS"), as well as modern telex service and modern telefax machines that transmit facsimiles of documents over telephone lines (J.A. 34). He has found that "about 99 percent of my telephone connections to and from the Virgin Islands are made without the necessity for redialing," and while he has "occasionally" experienced static on the lines, "this does not happen significantly more often than in calls I make within the United States or locally in New York and New Jersey" (*id.*). Problems with the quality of telecopier or telex transmissions were also denied (*id.*).

As for assuring the ethics of non-residents, De Vos noted that mainland bar members could serve on the Committee of Bar Examiners and volunteered his own services. He added that the burden posed by non-resident applicants should be

slight since the Committee currently relies on the National Conference of Bar Examiners to compile character data on applicants (J.A. 35).

Finally, De Vos stated that concerns about a non-resident's availability for court dates could be addressed by having a Virgin Islands partner or other local counsel "who would be expected to be thoroughly familiar with the background and status of the case," and he noted that his colleagues in the Virgin Islands are fully familiar with proceedings that are pending there and can "handle any last minute problems that may arise while one of the attorneys may be unavailable" (J.A. 35-36).

In defending the rule, petitioner Barnard's affidavit devoted only three sentences to the issue of air service. He noted that air travel from the mainland to the Virgin Islands takes at least two and one-half hours and added without elaboration that during the tourist season, "reservations may be totally unavailable for commercial flights . . . for protracted periods of time" (J.A. 37). The two sentences dealing with telephone service were also highly conclusory. He acknowledged that service had "substantially improved in recent years," although in his view it was still "significantly less reliable than that normally expected within the Continental United States" and was marked by difficulty in securing a long distance connection and interference from "static, voice fade outs, transmission gaps, or disconnections" (J.A. 38). Mail delivery was also said to be "often unreliable" and to involve "material delay" (*id.*).

Barnard also expressed concern that non-residents might lack a "commitment" to the Islands and to staying abreast of developments in local law and that it would be difficult to police the ethical behavior of these lawyers (J.A. 38-39). He also cited problems experienced with non-resident lawyers who

are admitted *pro hac vice*, but who fail to appear at hearings, and whose local counsel are unprepared to handle the case (J.A. 40). He also expressed reservations that non-resident bar members could discharge their obligations under a local rule requiring lawyers to represent indigents in criminal cases which the public defenders are unable to handle (J.A. 40-41).

An affidavit from Bar Association President Patricia D. Steele was to the same general effect, adding only that there was a lag in the publication of court opinions (J.A. 44-45). Several months later, however, the Bar Association announced that it had been "given the responsibility of distributing all Territorial and District Court opinions" and that henceforth, bar members could subscribe to opinions of these courts for an annual fee of $25 (J.A. 49-50). No party opposed having the case decided on the papers presented, and no one suggested the need for a trial on any of these points.

The District Court entered summary judgment for petitioners on 8 December 1986 (Pet. App. 58a-67a). In upholding its rule, the court cited "special circumstances surrounding the practice of law in the Virgin Islands" which were said to distinguish this case from *Piper* (Pet. App. 64a). The opinion relied on language in the 1973 *Aronson* opinion about limited space aboard commercial flights and added, without citation, that while the number of flights had increased since then, so too had the number of tourists, thus making air travel on short notice "difficult, if not impossible" (Pet. App. 65a). Telephone service was described in a sentence as "erratic," with connections to the mainland said to be "frequently" unavailable, but no details were provided (*id.*). Also cited was a delay in publication of court opinions, statutes and rules, the District Court's heavy workload, and difficulty in assuring the ethics of non-residents (Pet. App. 65a, 67a).

Cited as "[p]erhaps the most compelling reason" for retaining the residence requirement was Rule 16, which governs appointment of counsel in criminal cases (Pet. App. 65a; 75a-78a). The opinion noted that all bar members must be available for such appointments and added (although these requirements do not appear in the text of that rule) that "none but the appointed attorney may appear on behalf of the criminal defendant," that a lawyer who "declines a criminal assignment is totally barred from the practice of law in the district court," and that the "foregoing rules are admitting of no exception" (Pet. App. 66a).

All of these justifications focused on the need for a residence requirement *after* lawyers are admitted to the Virgin Islands bar. By contrast, petitioners made no attempt to defend the requirement in Rule 56(b)(4) that lawyers must live in the Islands for one year *before* they are licensed there, even if they have already passed the bar examination. The District Court held that this restriction was valid because people move to the Islands, only to return to the mainland because of the inconveniences and high cost of island living, a tropical climate which they regard as "intolerable" and a school system "which is considered by some as a serious drawback" (Pet. App. 67a).

C. *Court of Appeals Proceedings.*

On 30 September 1987, a divided panel of the Third Circuit reversed, relying on this Court's intervening decision in *Frazier* (Pet. App. 35a-57a). The case was reargued *en banc*, and on 31 March 1988 the full court, by an 8-5 margin, agreed with the panel that the rule was invalid under *Frazier* (Pet. App. 1a-34a).

The majority opinion of the *en banc* court noted that the

Privileges and Immunities Clause applies to the Virgin Islands by the terms of the Organic Act, thus raising the question of whether this rule is valid under *Piper*, but the court elected to decide this case on non-constitutional grounds under *Frazier* (Pet. App. 5a). After reviewing the reasons cited for excluding non-residents here, the court concluded that they "are essentially the same as those rejected for lack of inherent merit in *Frazier*" and that, as in *Frazier*, alternative, less restrictive policies could be adopted to achieve the district court's goals with respect to assuring that lawyers are ethical, competent and willing to do their share in representing criminal defendants (Pet. App. 7a).

More generally, the court of appeals concluded that this Court "did not invoke its supervisory power merely to adopt an ad hoc rule for the resolution of the problem presented" in *Frazier*, as such a reading "would create the possibility of litigation with respect to every federal district having a residence requirement" (Pet. App. 7a). Instead, "*Frazier* must be viewed as generally applicable to the United States district courts," and it found no basis for distinguishing the District Court of the Virgin Islands from other district courts (Pet. App.8a).

Finally, the court of appeals added that "[e]ven against the remote possibility" that *Frazier* did not control here, there was a separate basis for overturning the Rule, namely, that court's supervisory authority over the District Court of the Virgin Islands, which had been exercised in the past "to apply to the Virgin Islands provisions of federal statues which do not apply by their own terms," such as the Jencks Act and the Speedy Trial Act (Pet. App. 9a).

The dissenting opinion sought to distinguish *Frazier* and *Piper* on the ground that the applicants there lived in a

neighboring state, whereas non-resident bar members would not be as accessible here (Pet. App. 15a-16a). It also argued that *Frazier* was decided after a trial, whereas the summary judgment affidavits in this case raised factual issues which required a trial (Pet. App. 16a-17a). It also supported the rule on the ground that the District Court of the Virgin Islands, as a territorial court, has more rulemaking autonomy than do federal district courts (Pet. App. 18a-22a).

The dissent further argued that the reasons for limiting bar membership to Virgin Islands residents were substantial enough to let the rule pass muster under the Privileges and Immunities Clause (Pet. App. 23a-32a), although it discussed only the continuing residence requirement and did not defend the pre-admission restriction other than to say that its validity "may have deserved further development at trial" (Pet. App. 24a n.11).

SUMMARY OF ARGUMENT

1. The judgment below should be affirmed because this Court has considered and rejected the arguments advanced here in *Piper* and *Frazier*, and there is no legal or factual basis for distinguishing the Virgin Islands from other jurisdictions. While the court of appeals correctly applied *Frazier* in striking down this rule in an exercise of supervisory authority, it is clear here, as it was not in *Frazier*, that this rule is subject to the Privileges and Immunities Clause. Thus, if the Court elects not to affirm the Third Circuit's exercise of supervisory authority, it should hold the rule unconstitutional under *Piper*, since Congress has specified that the Privileges and Immunities Clause shall apply to the Virgin Islands with "the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561.

Piper and *Frazier* rejected in broad terms the claim that a lawyer's residence is an adequate measure of his or her competence, ethics, or willingness to attend court hearings or to do volunteer legal work. *Piper* recognized that, as a practical matter, a lawyer was unlikely to seek admission to a bar unless he or she anticipated a regular practice there, and this consideration made it likely that non-resident lawyers, no less than residents, would invest the necessary time, money and effort to building a practice and that the concerns advanced in favor of a residence requirement were vastly overstated.

Petitioners try to distinguish these cases by noting that the non-residents there lived in an adjacent state, and they argue that such non-residents can more easily fulfil their professional obligations than would be possible here. The point is explicitly answered by *Piper*, which makes it clear that a lawyer's distance from the jurisdiction is no basis for totally excluding him or her from the bar, though it may provide a reason for requiring the affiliation of local counsel. So too here, most of petitioners' concerns can be addressed if non-residents affiliate with local counsel who will keep them abreast of any changes in local law, as well as handle court appearances and help with appointed criminal assignments if need be. In fact, that is exactly what respondents have arranged here.

Thus, since there are answers to all of petitioners' objections, and since it cannot be said that a flat ban on non-residents pursuing their profession is closely tailored to achieving the territory's objective, *Piper* and *Frazier* control here.

2. Although petitioners did not raise the point in this Court, there is no basis to remand the case for a trial on such issues as the adequacy of air and telephone service, on which the parties differed. The dispute is not over the facts, but over whether the facts justify the rule. In any event, petitioners

did not submit enough evidence to warrant holding a trial, much less to rebut respondents' factual showings on these points.

ARGUMENT

I. THE VIRGIN ISLANDS' RESIDENCE RESTRICTIONS ARE INVALID.

On three occasions in the past four years, this Court has held that lawyers may not be denied a license to practice law simply because they live in another jurisdiction. In *Piper* and in *Supreme Court of Virginia v. Friedman*, 108 S. Ct. 2260 (1988), the Court held that it was unconstitutional for a state to favor its residents over non-residents, regardless of whether they seek a license by examination or on motion. In *Frazier*, the Court exercised its supervisory authority to invalidate a rule which limited membership in a federal district court bar to lawyers who lived or had an office in the state where the district court was located.

Petitioners ask the Court to hold that the situation in the Virgin Islands is so factually and legally unique that restrictions which would be invalid elsewhere may be upheld here. Before explaining why there is no basis for making such a distinction, however, a preliminary comment is in order. The court of appeals chose to decide this case on the basis of *Frazier*, thus avoiding the need to determine whether the District Court's residence requirements violate the Privileges and Immunities Clause, which Congress in the Organic Act "extended to the Virgin Islands . . . with the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561. Thus, if the Court should decide for whatever reason not to use its supervisory authority here, it must decide whether this rule is constitutional under *Piper*.

Because the analysis in *Frazier* is similar to and builds on that in *Piper*, we begin in part A by discussing the two cases together and explain why they control here as a matter of law. In part B, we answer petitioners' factual assertions and show why their concerns are overstated. In part C, we show why the 1984 amendments to the Organic Act do not prevent this Court or the Third Circuit from exercising supervisory authority to strike down this rule. Finally, in part D, we explain why Congress's decision that the Privileges and Immunities Clause should apply to the Virgin Islands as it does to the states answers petitioners' argument that conditions in the Virgin Islands are so different that these restrictions may be upheld.

A. *Piper and Frazier Are Broad in Scope and Control Here.*

The seminal case in this area is *Piper*, which struck down a residence requirement for membership in a state bar under Article IV, § 2 of the Constitution, which provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Hamilton called this Clause "the basis of the Union," The Federalist No. 80, at 537-38 (J. Cooke ed. 1961), and this Court has explained that the Clause was intended by the Framers to "help fuse into one Nation a collection of independent, sovereign States" and to "insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (footnote omitted). *Accord, Friedman, supra*, 108 S. Ct. at 2264; *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975); *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 180 (1869)

The rule at issue in *Piper* was struck down under a two-part test which asks at the outset whether the activity in question is a "privilege" or "immunity" which "bear[s] on the vitality of the Nation as a single entity," *Baldwin v. Montana*

Fish & Game Comm'n, 436 U.S. 371, 388 (1978), which includes the "pursuit of a common calling." *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 219 (1985). If this requirement is met, the state law will be upheld only if "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective," and this analysis includes consideration of any "less restrictive means" that may be available. *Piper, supra*, 470 U.S. at 284. *Accord, Friedman, supra*, 108 S. Ct. at 2265-66. *See also Toomer v. Witsell, supra*, 334 U.S. at 398 (discrimination against non-residents allowed only if they are "a peculiar source of the evil at which the law is aimed").

Piper held that the opportunity to practice law is a "fundamental right" which falls within the ambit of the Clause, explaining that "the practice of law is important to the national economy" and that lawyers have a "noncommercial role and duty," such as defending unpopular causes, which makes invocation of the protections of this Clause particularly appropriate. 470 U.S. at 281. *Accord, Friedman*, 108 S. Ct. at 2264-65; *see also Hicklin v. Orbeck*, 437 U.S. 518, 525 (1978); *Ward v. Maryland*, 12 Wall. (79 U.S.) 418 (1871). On the merits, the Court examined and found wanting the state's assertions (which petitioners echo here) that the rule was needed because non-resident lawyers are less likely than resident lawyers to: (1) remain familiar with local rules and practices; (2) behave ethically; (3) be available for court appearances, especially those called on short notice; and (4) do *pro bono* work.

The Court found no reason to assume that "a nonresident lawyer — any more than a resident — would disserve his clients by failing to familiarize himself with the rules" or laws

in effect in the state. *Id.* at 285. Nor did the Court find any "reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner," adding that a lawyer's "professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers." *Id.* at 285-86.

The Court found "more merit" to the concern about having lawyers available to hearings, but not enough to sustain the restriction. *Id.* at 286. The Court noted that a number of non-resident applicants would likely live in a place "reasonably convenient" to New Hampshire, thus making this concern irrelevant in most instances. *Id.* at 287. The Court did not hold, however, that only these nearby non-residents could be admitted to the New Hampshire bar. Instead, it indicated that lawyers who live "a great distance" from the state could also be licensed there, although their distance would permit the imposition of a rule requiring them "to retain a local attorney who will be available for unscheduled meetings and hearings." *Id.*

Finally, this Court largely discounted the idea that bar members would be disinclined to do their share of volunteer work, finding it "reasonable to believe" that "most lawyers who become members of a state bar will endeavor to perform their share of these services," in part because that serves their own professional interest. *Id.* The Court added, though, that non-residents and residents alike "could be required to represent indigents and perhaps to participate in formal legal-aid work." *Id.* (footnote omitted).

Piper was a broadly written opinion and was interpreted as such. Those states which had similar restrictions eliminated them, and today not one of the 50 states nor the District of Columbia imposes a residence requirement on its bar

members. This includes Alaska and Hawaii, which are further from any state than the Virgin Islands. Nor are such restrictions imposed by the Supreme Court of Puerto Rico, the Superior Court of Guam, or the Commonwealth Trial Court of the Northern Mariana Islands, all of which are subject to the Privileges and Immunities Clause to the same extent as the District Court here. 48 U.S.C. §§ 737, 1421b(u), 1561, and 1681 note (Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, § 501(a)). The District Court of the Virgin Islands is thus the only court — state or territorial — which has decided that it is not bound by *Piper*.[1]

The other hurdle which petitioners must overcome is *Frazier*, in which this Court, relying on its supervisory authority over the federal courts, struck down a rule requiring members of the bar of the United States District Court for the Eastern District of Louisiana to live or have an office in

[1]The Supreme Court of Alaska abolished residence restrictions prior to *Piper* in *Noll v. Alaska Bar Ass'n*, 659 P.2d 241 (1982), and *Sheley v. Alaska Bar Ass'n*, 620 P.2d 640 (1980), and the Supreme Court of Hawaii amended its Rule 1 to eliminate such a requirement after *Piper*. The Supreme Court of Puerto Rico amended Rule 2 of its Rules of the Board of Bar Examiners to eliminate a one-year pre-admission residence re-quirement, effective 16 January 1987; although reference to this restriction still appears in the governing statute, 4 L.P.R. Ann.§ 721(2) (1987 Cum. Supp.), the clerk's office confirms that the court is admitting non-residents. The Superior Court of Guam advises that it too eliminated a residence requirement after *Piper* was issued and now licenses mainland residents. The Commonwealth Trial Court in the Northern Mariana Islands does not have a residence requirement, although we are unable to determine whether it had one prior to 1986. 1 Commonwealth of the Marianas Code Div. 3, § 3602 (1986). While Puerto Rico, Guam and the Northern Mariana Islands are subject to the Privileges and Immunities Clause, other territories, such as American Samoa, are not. *Banks v. American Samoa Government*, 4 A.S.R.2d 113, 128 n.7 (1987). Thus, without knowing whether the High Court for American Samoa imposes such a restriction, we omit that territory from discussion here.

Louisiana. 107 S. Ct. at 2611-12 & n.7. The Court followed the analysis employed in *Piper* and held that a federal court's residence requirement could not be sustained because of concerns about a lawyer's competence or availability for court hearings.

The Court explained that a lawyer's application for bar membership "is likely to be based on the expectation of considerable local practice, since it requires the personal investment of taking the state bar examination and paying fees and annual dues," and that other requirements could be imposed to assure competence and familiarity with local law. *Id.* at 2613. Nor did the fact that a lawyer had an in-state office "warrant the assumption that he or she is more competent than an out-of-state member of the state bar." *Id.* As for assuring attendance at hearings, the Court cited the availability of modern communication systems, including conference telephone arrangements, adding that sanctions could be imposed on lawyers who fail to appear at hearings and that local counsel could be required for non-local lawyers. *Id.* & n.8.

The Eastern District of Louisiana promptly amended its rule to conform with *Frazier*, although some other district courts with similar rules have not done so yet. For present purposes, however, we note that a local residence is not required in order to be admitted to the federal district courts in Hawaii, Puerto Rico, Guam or the Northern Mariana Islands, although all of these courts require non-resident counsel to have local counsel. *See* D. Hawaii R. 110-1, 110-2; D.P.R. R. 201, 203; D. Guam R. 110-1; D.N.M.I. R. 110-1.

Finally, just last Term, the Court held in *Friedman* that the protections of the Privileges and Immunities Clause apply even when a state chooses to license experienced lawyers without requiring them to take an examination. 108 S. Ct. at 2264-65.

On the merits, the Court rejected the state's argument that: "Lawyers who are admitted in other States and seek admission in Virginia are less likely to respect the bar and further its interests solely because they are nonresidents." *Id.* at 2266. It held that there were less restrictive ways of achieving the state's goals, noting that the requirement that motion applicants have an in-state office "furnishes an alternative to the residency requirement that is not only less restrictive, but also is fully adequate to protect whatever interest the State might have" in assuring that motion applicants engage in a regular practice in Virginia, as the motion admission rule requires. *Id.* at 2267.

In defending the residence restrictions here, petitioners rely on exactly the same justifications which were advanced (and rejected) in *Piper*, *Frazier* and *Friedman*. Thus, petitioners argue that the restriction promotes lawyer competence, ethics and availability for court hearings and also that it assures that bar members do their share of *pro bono* criminal defense work (J.A. 38-41, 44-45; Pet. App. 64a-67a). What makes this case different, petitioners argue, is the Virgin Islands' geographic separation from the mainland and the attendant problems that causes. They argue that *Piper*, *Frazier* and *Friedman* are distinguishable because the applicants in those cases lived in a neighboring state; while non-resident lawyers could fulfill their professional obligations in that type of situation, they argue, the same cannot be said of a mainland lawyer who also seeks to practice in the Virgin Islands.

In section B, *infra*, we explain why these cases cannot be distinguished on that basis and why petitioners' argument is based on a fundamentally erroneous reading of *Piper* and its progeny. We also demonstrate why, as *Piper* held, there are less restrictive alternatives which will address each concern and why, as a practical matter, they are overstated. Before doing so, however, two preliminary comments are in order.

First, none of the arguments raised by petitioners explains the need for Rule 56(b)(4), which requires lawyers to live in the Virgin Islands for a year before gaining their license (Pet. App.78a). Petitioners did not defend this rule below, and even the dissenting judges had "serious reservations" about its validity (Pet. App. 24a n.11). Indeed, as we discuss below (at 33-34), this artificial constraint on the number of on-island lawyers actually retards the District Court's goal of providing legal assistance to indigent criminal defendants. Thus, whatever the Court may decide with respect to the post-admission restriction in Rule 56(b)(5), it should affirm the court of appeals' judgment that the pre-admission restriction in Rule 56(b)(4) is invalid.

Second, in Part I of this Argument, we accept for argument's sake petitioners' characterizations that the air, telephone and other services are less than ideal, but we explain why problems of that sort cannot sustain the rule. As our Statement of the Case indicated, respondents do not concede the accuracy of these characterizations, and Part II of this Argument will explain why, even if the Court is willing to consider these types of arguments as a basis for upholding the rule, petitioners' factual showing on each point was so vague and conclusory as to preclude entry of summary judgment in their favor or even a remand for trial.

B. *Petitioners' Distinctions Are Legally Invalid.*

Petitioners' entire legal argument hinges on a sentence in *Piper* which indicates that as a practical matter, most out-of-state applicants will live at a place "reasonably convenient" to the licensing state. 470 U.S. at 287, *quoted in Frazier*, *supra*, 107 S. Ct. at 2613. This observation merely states the obvious, however, and there are several reasons why it cannot properly be viewed as a limit on the holding of *Piper*.

First, petitioners' argument ignores language in *Piper* which makes it clear that some individuals who will seek membership in a state bar will reside "a great distance" from the state. 470 U.S. at 287. The Court did not even suggest that such applicants could be excluded from a state bar on this basis, although it did recognize that their distance from the state would permit the adoption of a rule requiring them to obtain local counsel who would handle unscheduled meetings and hearings. *Id.*

Second, the concern was clearly raised in *Piper* that invalidating the rule would open the door not only to Vermont lawyers, but also to lawyers from New York, Los Angeles and other distant cities who would not be as committed to New Hampshire as local residents or even residents of neighboring states. The court of appeals was evenly divided with respect to the validity of the rule in *Piper*, and the judges who voted to uphold the restriction stated that New Hampshire was justified in excluding non-residents in order to prevent "large law firms in distant states" from simply "qualify[ing] one or two of their number for New Hampshire practice [and] dispatching them from their homes in upper Manhattan or Santa Monica as necessary to handle New Hampshire litigation," adding that the New Hampshire bar "could come to be dominated by out-of-state lawyers whose only connection with the state would be their desire to earn money there." 723 F.2d 110, 119 (1st Cir. 1983). That argument failed to persuade this Court in *Piper*, 470 U.S. at 278, and similar claims cannot be credited here.

Finally, we note that Justice White's concurring opinion in *Piper* expressed a preference for invalidating the rule on the facts of that case, which involved a Vermont lawyer who lived 400 yards from the New Hampshire border, rather than by invalidating the rule on its face. *Id.* at 288-89. The other

seven Justices in the majority declined to decide the case on this basis, however, and the Court's later rulings in *Frazier* and *Friedman*, which extended the reach of *Piper*, suggest that the principles announced in these three cases are to be broadly applied. Thus, it is legally irrelevant in this case that the Virgin Islands are islands and are not directly adjacent to another land mass.[2]

Moreover, petitioners' argument misses a larger theme which permeates *Piper* and *Frazier*, namely, that a lawyer is unlikely to seek admission to a bar unless he or she anticipates enough of a practice there to justify the requisite investment of time, money and effort. *See* 470 U.S. at 285; 107 S. Ct. at 2613. This is true with respect to the Virgin Islands no less than any other jurisdiction. There are practical considerations which any mainland lawyer must consider in deciding to seek admission in the Virgin Islands bar, and they will likely deter all but those who intend to devote a regular portion of their practice to the Virgin Islands.

First, applicants must pay a $200 fee and take a bar examination, which is administered only once a year in July. There is no way to be admitted to the Virgin Islands bar on motion, and if anything, taking a bar examination in the Islands may be riskier than in other jurisdictions, since there is no formal review course. Thus, even if there were no residence requirement, it is likely that applicants would have to invest in a trip to the Islands to review local law and consult with local lawyers.

Once admitted to the bar, there are ongoing obligations which must be met. Lawyers must pay annual dues of $100

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[2]We note, however, that these restrictions apply with equal force to residents of Puerto Rico, which is 40 miles from the Virgin Islands at its closest point and which has frequent air service linking it to the Virgin Islands (J.A. 33).

to the Bar Association and a $500 annual license fee. 27 V.I. Code Ann.§ 302(a). Non-residents must also consider the logistics of practicing on the mainland and in the Islands, including the obligation to handle their share of *pro bono* criminal assignments. And if they are derelict in handling their professional obligations, they can be suspended or disbarred, which may affect their eligibility to practice law in a mainland jurisdiction.

These practical considerations will not deter individuals such as respondents, but they are likely to deter applicants who simply want to hang another sheepskin on their office wall. What they also suggest is that lawyers are unlikely to seek admission to the Virgin Islands bar unless they intend to enter a partnership or otherwise affiliate with a resident lawyer who will agree to handle matters that arise while the non-resident lawyer is on the mainland.

This is precisely what respondents have done here. Although they are based in New York, they have a resident partner and associates in the Islands, and their colleagues are jointly responsible for each pending case and can be readily contacted by a local judge if necessary. If local counsel is available and able to handle such a hearing, it makes no difference whether his or her non-resident partner is absent. And even if non-residents are unwilling to affiliate with local counsel, *Piper* indicates that they may be required to do so because of their "great distance" from the Islands. 470 U.S. at 287.

The availability of local counsel to handle emergency hearings answers concerns about the alleged inadequacy of air service or telephone service linking the Islands to the mainland. Thus, the imposition of such a requirement is a far less restrictive means of achieving the District Court's goals than a flat exclusion of non-residents from the bar.[3]

Several district courts which are further removed from the mainland than the Virgin Islands — those in Hawaii, Guam and the Northern Mariana Islands — license lawyers without regard to residence, but expect that non-resident counsel have local counsel who will take a full and active role in litigation if the need arises. For example, Rule 110-1(e) of the District Court of Guam requires non-resident bar members to:

> designate an attorney who is an active member in good standing of the Bar of this Court as co-counsel. He shall file with such designation the address, telephone number and written consent of such designee. The associated local attorney shall at all times meaningfully participate in the preparation and trial of the case with the authority and responsibility to act as attorney of record for all purposes. Any document required or authorized to be served on counsel by the Federal Rules of Civil or Criminal Procedure, the Bankruptcy Rules, or by these Rules, shall be served upon the associated local counsel. Service upon associated local counsel shall be deemed proper and effective service unless ex-

[3]Petitioners' summary judgment affidavits devoted a sentence to the issue of mail service (J.A. 38), but their brief now cites (at 11 n.5) some recent press releases from Delegate Ron DeLugo to the effect that first-class mail service from the mainland to the Islands is not at mainland levels. One release adds, however, that the "record for delivery of mail from one island to the other, or even on the same island, is not much better," which hardly argues for a rule limiting practice to residents only. The case dealing with mail service which *amicus curiae* reprints as an appendix to its brief has been withheld from publication by the Third Circuit and is thus not authoritative precedent under that court's Internal Operating Procedures (Ch. V.F.1), but in any event it does not suggest that the Third Circuit regards mail service to the Islands to be uniquely poor.

cused by the judge. Local counsel shall attend all proceedings related to the case before this Court for which counsel is associated (unless excused by the Court).[4]

Petitioners argue that local counsel is not a solution, citing problems experienced with *pro hac vice* practitioners in other cases (J.A. 40), but as this Court made clear in *Frazier*, that experience is not probative of what the experience would be if lawyers were seeking admission to the bar with the expectation of a regular practice in the jurisdiction, and that is precisely what respondents intend here. 107 S. Ct. at 2612.

These observations about local counsel also answer petitioners' point about the lag in publishing court opinions, sessions laws or agency rules. In the first place, bar members can now subscribe to District Court and Territorial Court slip opinions for an annual fee (J.A. 49-50). To the extent that there is a delay in publishing sessions laws or rules, we note that the Virgin Islands are not unique in this regard, and in any case, local counsel can be asked to check on any recent developments.[5] Indeed, a lawyer who is going to render an

[4]The texts of the local counsel rules in Guam, Hawaii and the Northern Marianas are almost identical (D. Hawaii R. 110-1; D.N.M.I. R. 110-1(f)). We note that the cited rules in all three district courts treat non-resident lawyers as being "inactive" bar members who cannot appear in a case unless they are affiliated with local counsel. This classification has little practical consequence in these or other district courts, since the only reason why lawyers seek a license there is to litigate cases. It would be inappropriate here, however, since the District Court of the Virgin Islands licenses lawyers not only to litigate federal cases, but to write wills, handle house closings, draft opinion letters and handle a variety of other matters that lawyers do every day of the week as "active" members of a bar.

[5]Petitioners' concern about the availability of statutes may in fact be overstated. For example, the pocket parts to the Virgin Islands Code Annotated which are designated for use in 1988 arrived in this Court's library on 23 March 1988.

opinion letter on Virgin Islands law is likely to do this in any event, regardless of his or her residence.

If anything, the Islands' isolation from the mainland should increase the sensitivity of non-resident bar members to issues such as the availability of air and telephone service, and they will likely take those factors into account in setting up their practice, as respondents have done here. As a practical matter, a client has many good reasons to retain a local attorney, particularly if the client or the client's headquarters is far removed from the jurisdiction. If a client nonetheless chooses to rely on a non-resident lawyer, the client doubtless has good reasons for doing so, such as the lawyer's familiarity with the client's business, the lawyer's skill in a particular specialty, or some other reason which has caused the client to place special trust in and reliance on the non-resident lawyer, who likely handles other matters for the client as well. *See Frazier, supra*, 107 S. Ct. at 2614 n.12. Thus, if a non-resident lawyer has a case dismissed because he or she fails to appear, or if the lawyer erroneously advises a regular client because he or failed to check the latest sessions laws, that lawyer has much more to lose than a local lawyer who is retained to perform the same task on a one-time basis.

Moreover, to the extent that petitioners complain about the inadequacy of current services, they fail to consider the fact that the elimination of trade barriers may help to ameliorate those problems. Generally speaking, the cure to problems of insularity is not continued isolation, but openness. Thus, if the number of bar members increases, a legal publisher or database company may have an incentive to report Virgin Islands opinions and laws on a more rapid basis. There are also things that the Government of the Virgin Islands can do other than file a brief complaining about how bad current conditions are. If the publication of court opinions and session laws is unduly

delayed, the Government can award the contract to another publisher, just as its Public Service Commission can switch telephone carriers if the current one is not doing a good job. And one should not lose sight of the fact that a less restrictive admissions policy will benefit clients by offering an expanded range of legal services.

This sort of analysis also answers petitioners' remaining concerns. With respect to assuring non-resident lawyers' ethics, the reasons stated above, as well as those expressed in *Piper*, suggest that non-residents have as much incentive as local lawyers to maintain a good reputation in the community. And if problems should develop after a lawyer is admitted to the Virgin Islands bar, the fact that he or she is a Virgin Islands bar member gives the authorities more leverage than if the lawyer appears *pro hac vice* in a case and is never heard from again. As for the concern about checking on the character of non-resident applicants, petitioners presently rely on a mainland entity, the National Conference of Bar Examiners, to compile character information. If the concern is that the Committee of Bar Examiners will have to read more applications, that is no basis for denying applicants a license, and admitting more lawyers will increase the pool of potential Committee members, such as respondent De Vos, who has volunteered to serve (J.A. 35).

Finally, it is argued that non-residents must be excluded from the Virgin Islands bar because they could not handle *pro bono* representation of indigent criminal defendants. It is important to note what is *not* at issue here, and that is the authority of the District Court to call upon members of the bar to supplement the work of the Federal Public Defender, which handles most of the appointed criminal cases in that court. Indeed, *Piper* made it clear that a court may ask non-residents, no less than resident bar members, to undertake mandatory *pro bono* assignments. 470 U.S. at 287.

What *is* at issue is the District Court's preference (which is nowhere embodied in the text of the applicable rule, *see* Pet. App. 75a-78a) that only the lawyer who is assigned to a given case can appear on behalf of a defendant at each and every hearing, no matter what the subject is and no matter who the substitute attorney may be. The record does not show any basis for barring an appointed lawyer from asking a colleague to handle a particular hearing or matter in the lawyer's absence. Indeed, if this gloss on the rule were enforced as rigidly as petitioners suggest (but never directly state), the effects would be counter-productive, if not harmful to the efficient operations of the District Court.

There are currently times when a Virgin Islands lawyer is busy elsewhere, say, trying a case in the Territorial Court or attending depositions on the mainland, and simply cannot attend an emergency bond revocation hearing or similar proceeding. Surely, the interests of justice are better served in that situation if that lawyer can send a colleague to District Court and get the matter disposed of, rather than ask for a continuance. Similarly, if this gloss on the rule were literally interpreted, a trusts and estates specialist could not ask a partner with 25 years of criminal trial experience to take the principal role in a first degree murder case, a result that would raise serious questions regarding the effective assistance of counsel.[6]

[6]Petitioners' counsel acknowledged during the *en banc* reargument that this rule is not applied as rigidly as their papers suggest. Judge Cowen asked how it "could possibly be to the reasonable interest of [a] criminal defendant if he gets assigned someone who's not a court litigator," to which counsel answered that a lawyer who believes he or she is not qualified to handle the case can "make application to the court to determine whether a substitution can be made" under Rule 16(B)(i) (Pet. App. 76a). Transcript of oral argument at 36-37 (29 December 1988). Rule 16(B)(j) also states that the court "may, in the interests of justice, substitute one or more appointed counsel for another at any stage of the proceedings before it" (Pet. App. 76a).

To substantiate this argument, petitioners state that lawyers are generally asked to handle three or four criminal cases each year, implying that these are all District Court cases where the "no substitution" practice applies (J.A. 40-41, 44-45). In fact, this estimate seems to include cases assigned by the Territorial Court, which has a larger criminal docket and in which appointed counsel can ask a colleague to help out. Indeed, the statistics filed by the District Court and the Federal Public Defender with the Administrative Office of the United States Courts suggest that bar members may go for more than a year between District Court criminal assignments, even assuming that the assignments are parcelled out evenly among all bar members.

Thus, the preliminary *Annual Report of the Director of the Administrative Office of the United States Courts* shows (at 92, 88, 109) that for the fiscal year ending 30 June 1988, 396 defendants were charged in 324 criminal cases filed in the District Court of the Virgin Islands; 326 of these defendants were represented by the Federal Public Defender, leaving 72 defendants to be represented by the private bar. According to the 1988 *Martindale-Hubbell Law Directory* (Vol. VII, pp. 55-58) there are approximately 165 lawyers in Virgin Islands, apart from those in government or judicial service. Thus, even if all 72 defendants required appointed counsel, there are more than enough bar members to represent them in a given year.[7]

[7]The figures are comparable for the two preceding years. For the year ending 30 June 1987, 321 criminal cases were filed involving 392 defendants, 354 of whom were represented by the Federal Public Defender, leaving 38 defendants to be served by the private bar. *Annual Report of the Director of the Administrative Office of the United States Courts (1987)* at 238, 246, 288. For the year ending 30 June 1986, which largely coincides with the period that this case was being litigated in District Court, 264 criminal cases were filed involving 331 defendants, of whom 271 were represented by the Federal Public Defender, leaving 60 defendants to be served by the private bar. *Annual Report of the Director of the Administrative Office of the United States Courts (1986)* at 232, 250, 357.

Figures provided by the clerk's office in the Territorial Court confirm that the criminal caseload there is more substantial, with 784 cases filed in calendar year 1986 and 1024 cases in calendar year 1987. Although figures are not readily available, a substantial number of those cases are handled by the separate Office of the Public Defender. 5 V.I. Code Ann. § 3521.

We do not doubt that some lawyers may be asked to handle three or four criminal cases a year in District Court, either because they seek these assignments or because the judges trust their trial skills, but that is a matter of choice. Thus, a bar member's mandatory *pro bono* duties are not as extensive as petitioners suggest, and in any event, the District Court's preference that only appointed counsel appear in a given case is plainly excessive as a means of assuring that criminal defendants receive adequate legal representation.

More importantly, there are far less restrictive means of achieving that objective besides refusing to license non-resident lawyers. The simplest solution is allowing bar members, regardless of where they live, to send a colleague to court if they are unavailable. The principal objection to this proposal is that it would increase the workload on Virgin Islands lawyers (Pet. App. 34a), but the claim does not withstand scrutiny, because allowing non-residents to join the bar would increase the pool of available lawyers, thus reducing the overall burden on local lawyers.

Moreover, if handling criminal cases is part of the price of admission to the Virgin Islands bar, a non-resident lawyer knows that he or she must find a resident lawyer to handle matters that arise when the non-resident is on the mainland. As a practical matter, Virgin Islands lawyers will not enter into partnership arrangements or even serve as local counsel for mainland lawyers if they think that too much of their time will be taken up handling criminal cases for a mainland colleague. But if resident lawyers *are* willing to enter into such

arrangements and to appear on behalf of a client when the non-resident lawyer is unavailable, there is no reason why they should be prevented from doing so, nor can the District Court's refusal to let them do so be used as a reason for refusing to increase the pool of lawyers available to serve criminal defendants.

Other measures could be undertaken to provide criminal defendants with adequate representation, such as establishing a pool of attorneys who are willing to handle these cases, establishing an "interest on trust accounts" program, under which the interest on lawyers' trust accounts could be used to compensate criminal defense attorneys handling these cases, or imposing a licensing fee on lawyers who do not wish to serve as defense counsel (both resident and non-resident alike) which would be used to compensate attorneys handling these cases.

Finally (and paradoxically), there is one aspect of Rule 56 that artificially limits the number of lawyers who could handle criminal cases — the requirement that applicants must live in the Islands for one year before their admission, even if they have taken and passed the Virgin Islands bar examination. This restriction, which applies not only to recent graduates, but also to experienced practitioners who have decided to relocate to the Islands, makes no sense with respect to either set of applicants, and it actually reduces the availability of counsel for criminal cases. Indeed, many new lawyers seek to build a reputation and a practice by taking criminal cases, and some of the experienced lawyers may have done criminal work in their previous practice.

Petitioners have never made a specific defense of this restriction, which is obviously protectionist. The dissenting judges in the court of appeals did not defend it either, and the reasons cited by the district court dealt with perceived hardships of island life, which have nothing to do with a lawyer's

fitness to try cases (*see* Pet. App. 24a n.11, 67a). The existence of this restriction at least suggests that the remainder of Rule 56 may have similar, less lofty purposes than the ones petitioners state here. *See Piper, supra*, 470 U.S. at 285 n.18.[8] In any event, it is difficult to see how petitioners can complain about the need to get private bar members to handle criminal cases, when this rule artificially limits the supply of Virgin Islands residents who could handle these appointments.

A final observation may help place the argument in perspective. Most of petitioners' objections focus on litigation concerns, but they fail to acknowledge that the restrictions in Rule 56 affect not just litigators, but the much larger group of lawyers who never (or only rarely) see the inside of a courtroom. The District Court is the only court that licenses lawyers in the Virgin Islands. Thus, the rule operates not merely to preserve federal litigation for local lawyers, as was the case in *Frazier*, but to bar non-residents from gaining a license to pursue their profession in the Islands. Regardless of whether the Court decides this case on non-constitutional grounds under *Frazier* or on constitutional grounds under *Piper*, the sweep of this rule is all-encompassing and is certainly not "closely tailored" to address the specific problems which are said to be posed by non-resident lawyers. *Hicklin v. Orbeck, supra*, 437 U.S. at 528.

This discussion demonstrates why the court of appeals was correct in following *Frazier* and why, since Congress has ex-

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[8]The integration rule governing the Virgin Islands Bar Association waives this one-year rule for employees of the United States Government, the Government of the Virgin Islands or legal services groups. 5 V.I. Code Ann., App. V, R. 51(a), (b). Thus,the only lawyers directly affected by this restriction are those contemplating a private law practice in the Virgin Islands.

pressly applied the Privileges and Immunities Clause to the Virgin Islands, the rule is unconstitutional under *Piper* as well. Apart from *Frazier*, there is a separate non-constitutional basis for affirming the judgment below, namely, the Third Circuit's own supervisory authority over the District Court of the Virgin Islands. *See LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957). Petitioners' brief does not address this point, but, as the court of appeals pointed out (Pet. App. 9a), that power has been exercised in the past to extend to the Virgin Islands various protections which are available in mainland courts, but which Congress has not explicitly extended to the Islands, including the Speedy Trial Act, the Bail Reform Act, and the Jencks Act. *Government of the Virgin Islands v. Bryan*, 818 F.2d 1069, 1074 (3d Cir. 1987); *Government of the Virgin Islands v. Ortiz*, 427 F.2d 1043, 1047-48 (3d Cir. 1970); *Government of the Virgin Islands v. Lovell*, 378 F.2d 799, 805 (3d Cir. 1967).

Since the Third Circuit may use this power to give individuals rights which Congress had not specifically extended to the Virgin Islands, that court was surely on solid ground here, since Congress has extended the protections of the Privileges and Immunities Clause to the Islands and since the judgment below is fully consistent with *Piper*, *Frazier* and *Friedman*. Moreover, the Third Circuit is familiar with conditions in the Islands because its judges sit there twice a year, and thus its determination that the situation does not warrant an exception to the principles announced in *Frazier* or *Piper* merits respect.

For all these reasons, there is no basis for distinguishing *Piper*, *Frazier* and *Friedman* or for accepting arguments that were rejected in those cases to uphold the restrictions at issue here.

C. *The 1984 Amendments to the Organic Act Do Not Prevent This Court or the Court of Appeals from Invalidating the Rule.*

Apart from trying to to distinguish *Frazier* on the facts, petitioners' only legal challenge on the issue of supervisory authority is the claim that Congress prohibited the exercise of that power with respect to the Virgin Islands when it amended the Organic Act in 1984. Pub. L. No. 98-454, Title VII, 98 Stat. 1737-41, codified at 48 U.S.C. §§ 1611-1614 (Supp. III 1985). According to petitioners' brief (at 24), those amendments "clearly constitute[] a congressional determination to permit locally determined rules suited to the territory's special needs," and thus "to hold that the Virgin Islands must be swept into a uniform national rule of admission to practice is to disregard the congressional allocation of authority."

The problem with this argument is that it is premised on a less than complete description of the 1984 amendments. Petitioners correctly note that before these amendments were enacted, the Organic Act vested the judicial power of the Virgin Islands in the District Court, which was given the power to prescribe rules of practice and procedure for itself and any territorial court established by the Virgin Islands legislature. 48 U.S.C. § 1611(b)(1982). The 1984 amendments continued that power in the District Court and also vested it "in such appellate court and lower local courts as may have been or may hereafter be established by local law." 48 U.S.C. § 1611(a)(Supp. III 1985). They further provided that rules "governing the practice and procedure of the courts established by local law . . . shall be governed by local law or the rules promulgated by those courts." 48 U.S.C. §§ 1611(c)(Supp. III 1985).

What does all this mean in practice? Both before and after passage of the 1984 amendments, the only local court created by the Virgin Islands legislature was the Territorial Court, a trial court which shares jurisdiction with the District Court over certain civil and criminal matters, and from which appeals go to a three-judge appellate division of the District Court. 48 U.S.C. §§ 1612, 1613a (1982 & Supp. III 1985); *see also* p. 2, *supra*. The Territorial Court does not license lawyers separately from the District Court, and thus only District Court bar members are authorized to practice in the Territorial Court.

What the 1984 amendments did — and for whatever reason, petitioners fail to discuss the relevant provisions — was to give the Virgin Islands legislature the discretion to establish an appellate court to hear appeals from the Territorial Court, and when that court was established, the District Court's appellate function would end. 48 U.S.C. § 1613a(d) (Supp. III 1985). Under these amendments, this new appellate court would be the highest court in the Virgin Islands, and for the first 15 years after its creation, a party which lost there could seek review in the Third Circuit by writ of certiorari. In addition, the Judicial Council of that Circuit was directed to advise appropriate congressional committees about whether, at the end of this 15 year period, this new appellate court "had developed sufficient institutional traditions to justify direct review" by this Court. 48 U.S.C. § 1613 (Supp. III 1985).

The changes to other portions of the Organic Act (which petitioners do cite) are essentially editorial in nature. *Compare* 48 U.S.C. §§ 1611-14 (1982) with §§ 1611-14 (Supp. III 1985).They are intended to take account of any new, unified territorial court structure if and when the legislature should create it. Since the legislature has not acted, however, the

1984 amendments are not remotely relevant to this case.[9]

But even if all this is wrong, and even if *Frazier* cannot be invoked to strike down the restrictions in Rule 56, petitioners' argument is still beside the point as it is clear that the District Court and all territorial courts are still subject to the Privileges and Immunities Clause, which "shall have the same force and effect [in the Islands] as in the United States or in any State of the United States." 48 U.S.C. § 1561. Thus, even if Congress in 1984 freed the District Court from the supervisory authority of this Court and the Third Circuit, petitioners must still explain how this rule can be squared with *Piper*, which they cannot do.

D. *The Virgin Islands' Status as an Unincorporated Territory Provides No Basis for Upholding This Rule.*

Petitioners' final argument is that the Virgin Islands, like other unincorporated territories, have certain linguistic, historical and cultural attributes which make them so fundamentally different from the states that federal courts should defer to a local court's judgment about what restrictions must be imposed on members of its bar. The argument must fail because petitioners' analogies to other territories do not hold water, and, more fundamentally, Congress decided this issue when it applied the Privileges and Immunities Clause to the Islands.

The comparison with Puerto Rico is inapt. Puerto Rico has an Article III federal district court with exclusively federal jurisdiction. 28 U.S.C. § 119, 132(a). There is also a separate court system, headed by the Supreme Court of Puerto Rico,

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[9]Indeed, if the legislature did establish such an appellate court, it would eliminate the District Court's appellate docket and reduce the heavy caseload which was cited as a reason for excluding non-resident bar members (Pet. App. 65a).

which operates in the same manner as a state court system, and when these courts interpret Puerto Rico law, their decisions are regarded as controlling in this Court and in any federal court which may confront a question of Puerto Rico law (for example, in a diversity case).[10]

The Virgin Islands are in a totally different posture because they do not have a separate territorial court system, and the District Court of the Virgin Islands is not the final authority on territorial law in the same way that the Supreme Court of Puerto Rico is. The Third Circuit hears direct appeals involving questions of territorial law, and it has explicitly declined to show any special deference to the District Court's construction of territorial law, but reviews the underlying legal issue on a *de novo* basis. *Saludes v. Ramos*, 774 F.2d 992, 994 (3d Cir. 1984) (while the "district court's reading of local law should be respected . . . we will not accord it any greater deference than we would in a diversity action" and will exercise "plenary review" of territorial law issues presented on appeal).[11]

Thus, the cases petitioners cite regarding deference to courts on questions of state or territorial law have nothing to

[10]Puerto Rico also has considerably more control over its affairs than Congress has ceded to the Virgin Islands. When the United States and Puerto Rico agreed to the latter's commonwealth status, Puerto Rico was given the freedom to draft its own constitution, so long as it provided for a republican form of government and a bill of rights. *See* 48 U.S.C. § 731c. *See generally Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 586, 592-94 (1976).

[11]Petitioners cite some Ninth Circuit cases reflecting that court's former policy of deferring to the District Court of Guam in the latter's interpretation of Guam territorial law. What they fail to note that the Ninth Circuit recently abandoned that policy in a unanimous *en banc* decision which cited, among other reasons, a desire to harmonize its standard of review with the *de novo* standard used by the Third Circuit in reviewing Virgin Islands cases. *Guam v. Yang*, 850 F.2d 507, 510 (9th Cir. 1988).

do with the question of whether the restrictions in Rule 56 are constitutional, and similar restrictions have been declared invalid under the Equal Protection Clause and the Privileges and Immunities Clause in cases arising from Puerto Rico. *Flores de Otero, supra*; *Garcia v. Silver*, 760 F.2d 33 (1st Cir.1985). If anything, petitioners' comparisons with other territories bolster respondents' argument that the rule here should be struck down, inasmuch as the Supreme Court of Puerto Rico, the Superior Court of Guam and the Commonwealth Trial Court of the Northern Mariana Islands do not impose such restrictions on their bar members. *See* note 1, *supra*. Nor do the District Court of Guam nor the District Court for the Northern Mariana Islands, which have a legal structure and hybrid jurisdiction very similar to that of the District Court of the Virgin Islands. 48 U.S.C. §§ 1424-1424-b, 1611-1614, 1694-1694c. *See* pp. 23-24, *supra*.

Nor do the perceived language barriers (which are raised as a justification for the first time in petitioners' opening brief) make as much difference as petitioners suggest. Proceedings in Puerto Rico courts are conducted in Spanish, but that would plainly be no reason for limiting bar membership to Puerto Rico residents, and in any event, proceedings in the federal district court in Puerto Rico are conducted in English, 48 U.S.C. § 864, as are proceedings in the District Court of the Virgin Islands.[12]

[12]Petitioners note (at 29 n.16) that there is an indigenous Dutch Creole patois in the Virgin Islands without mentioning that the last person who spoke Dutch Creole fluently died in 1987, and the only way one can learn the language now is by attending a course at the local college. *Virgin Island Daily News* at 3 (1 October 1987).

Petitioners' brief also suggests (at 20 n.13) that this perceived language barrier can prevent a party from receiving a fair trial, relying on an unpublished Third Circuit opinion. *Government of the Virgin Islands v. Blyden*, No. 86-3346 (5 January 1988). Passing the fact that this claim was not

In the final analysis, though, petitioners' arguments are irrelevant because of a more fundamental problem, and that is the fact that Congress has decided the issue. Congress has exercised its plenary power over this territory and has stated without ambiguity that the Privileges and Immunities Clause shall be "extended to the Virgin Islands . . . with the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561. This judgment is conclusive and answers any and all distinctions raised by petitioners based on the Virgin Islands' status as an unincorporated territory.

Unlike the so-called "incorporated" territories, unincorporated territories do not have an anticipation of statehood, and only "fundamental" constitutional rights apply there. *Flores de Otero*, 426 U.S. at 599 n.30, and *see* cases collected there. Congress may, however, extend additional constitutional provisions to unincorporated territories, and "a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight." *Torres v. Puerto Rico*, 442 U.S. 452, 469-70 (1979).

This is particularly true with respect to the Privileges and Immunities Clause. There are many good reasons for Congress to let an unincorporated territory favor its residents over non-residents in ways that would be unconstitutional if attempted by a state. For example, it may wish to encourage people to relocate there or to favor those people whose efforts will be required for the territory's future development. Thus, if a territory's organic act fails to mention the Privileges and Immunities Clause, the territory is free to favor residents in this manner. *See Mullaney v. Anderson*, 342 U.S. 415 (1952). When Congress does choose to apply a constitutional provision to a particular territory, that decision "is entitled to great weight," *Torres*, 442 U.S. at 770, and that is particularly appropriate here, since Congress did not extend the Privileges and Immunities Clause to the Virgin Islands in the 1936 or 1954 versions of the Organic Act, and it was not until 1968 that this provision was included in the Bill of Rights section of that law. Pub. L. No. 90-496, § 11, 82 Stat. 841, amending 48 U.S.C. § 1561.

Because Congress has spoken with such clarity on this issue, as it has plenary authority to do under Article IV, § 3, the Court should be wary of requests to second-guess that judgment and to carve out exceptions to generally applicable standards, and the need for caution is particularly great when the effect of granting such a request would be to dilute constitutionally protected rights. If any deference is owed here, it is to the judgment made by Congress, and if conditions in the Virgin Islands are really as bad as petitioners allege, their remedy is to persuade Congress that it made the wrong decision in 1968 and that the Virgin Islands are not yet ready to be held to the same standards that are applied to the states — or to Puerto Rico, Guam, or the Northern Mariana Islands, for that matter.

II. THERE IS NO BASIS TO REMAND THIS CASE FOR A TRIAL.

This case proceeded below on the basis of cross-motions for summary judgment. Despite the parties' differing views

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made below and that the decision has no precedential value under the Third Circuit's Internal Operating Procedures, *see* note 3,*supra*, petitioners misstate what happened there. A *pro se* habeas corpus litigant raised 14 objections to his conviction, one of which was that his appointed lawyer "did not understand over 30% of testimony of government witnesses." Slip op. at 13. The district judge dismissed the suit, finding that "the vast majority" of these claims lacked merit, and the court of appeals remanded, not because it found merit to this claim, but because it could not review the judgment based on that conclusory statement. *Id.* at 14-15.

on such things as the quality of air and telephone service, no one sought a trial on these issues, apart from a passing reference to that effect by petitioners' counsel at the *en banc* reargument. Transcript of oral argument at 32 (29 December 1988). Although the dissenting judges below suggested that a trial was needed to sort out these disputes (Pet. App. 16a-17a), petitioners did not raise this issue in their certiorari petitions or their brief to this Court, nor did the Government of the Virgin Islands in its brief as *amicus curiae*. Thus, it does not appear that the issue is before the Court, but since respondents will not have an opportunity to answer such a claim if it is made in petitioners' reply brief, we make the following points.

Any dispute here is not over the facts, but the conclusions that one draws from them, given the legal issues in this case. One can probably prove at trial such facts as how many airline seats are available each day from the mainland to St. Thomas or St. Croix and how many seats are empty during peak times of the year. One could also show, for example, that even if the daily non-stop from Philadelphia to St. Thomas is often sold out, there are alternative one-stop flights through Miami or San Juan.

But what is a judge supposed to do with those facts? Does the example just cited warrant a conclusion that service from Philadelphia to the Islands is adequate because there are many one-stop options or inadequate because the daily non-stop is often full? On what basis is a trial judge to measure the adequacy of that service, and what is the point below which the judge is supposed to declare whether the service is so inadequate that a ban on non-resident bar members is justified?

The same can be said of telephone or mail service. How does one define what level of service is adequate? More importantly, how is any of this evidence probative of how good service would be if restrictions on mainland lawyers were removed and there was a demand for better service? Any trial would be inevitably retrospective, looking at the way things are now, and it would not address the ways things would be in the future.

Thus, it is not certain what a trial would accomplish in terms of developing a factual record that would allow the trial court or an appellate court to rule with any greater certainty on the legal issues presented on this record. Moreover, we note that there was a trial in *Frazier*, in which findings of fact were made after there was oral testimony about the need for a similar rule, but this Court found that evidence to be less than probative because it involved prior experiences with *pro hac vice* practitioners and not bar members who anticipated a regular practice in the district court. 107 S. Ct. at 2612. The district court in both *Piper* and *Friedman* had no difficulty in deciding the legal questions based on summary judgment affidavits, and this case can be decided on that basis too.

In making this point, however, it is important not to overlook the minimal nature of the evidence which petitioners placed in the record. On the issue of air service, petitioner Barnard merely noted that the Islands are two and one-half hours from the nearest point on the mainland, adding that:

> At many times of the year, particularly during what is locally referred to as 'the tourist season' between December and April, reservations may be totally unavailable for commercial flights from the Continental United States for protracted periods of time. Travel to the Virgin Islands by sea can be accomplished, for practical purposes, only by cruise ship which takes at a minimum several days of sea travel from the closest mainland point.

(J.A. 37). That is the *only* evidence in the record to support petitioners' assertions with respect to air service.

Barnard's description of communications is equally skimpy. While he states that the service to the mainland has "substantially improved in recent years," he adds that it:

> . . . remains significantly less reliable than that normally expected within the Continental United States. It is often difficult to secure a long distance connection to a distant point, or to maintain a fully audible conversation without interference from static, voice fade cuts, transmission gaps, or disconnections. Mail delivery is often unreliable and almost always involves material delays.

(J.A. 38). The only other evidence on telecommunications came from the president of the Bar Association, who stated that:

> [W]hile telecommunications between the Virgin Islands and the continental United States have improved substantially in the last decade, they remain erratic and conversations are frequently impaired by static, echoes, transmission gaps and disconnections.

(J.A. 44).

The foregoing is not a summary of petitioners' evidence. It is a verbatim recitation of *all* the evidence they placed in the record on these points, and the rest of their affidavits simply set forth their other concerns. These are the "facts" which they claim entitle them to summary judgment, yet this Court's cases make it clear that such a showing is not adequate to merit entry of summary judgment in one's favor, nor is it sufficient to defeat an opponent's summary judgment motion and force an issue to trial. *See generally Anderson v. Liberty Lob-*

by, Inc., 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The point is demonstrated here by comparing these vague generalizations with the evidence that respondents placed in the record specifically describing the amount and types of air service, including an indication that some of the best-served commuter routes in this country are those between the Virgin Islands and the airline "hub" at nearby San Juan, Puerto Rico (J.A. 33). Similarly, respondent De Vos described in some detail the telecommunications systems which he regularly uses between his office in New York and that of his colleagues in the Islands, including the availability of WATS lines and telefax machines (J.A. 33-34). Indeed, the index to petitioners' brief demonstrates that Virgin Islands lawyers have access to Lexis, which can be reached only by telephone lines to the mainland.

Finally, as a way of putting this issue in perspective, we note that the District Court's assessment of the air and telephone service has fluctuated sharply over the years. In its 1972 decision in the *Aronson* case, the District Court upheld its continuing residence requirement for bar members based on such factors as congested airline flights and the Islands' isolation from the mainland. Eight years later, however, the District Court held that a national bank could be sued not merely where it was chartered, but anywhere it had a branch, including the Virgin Islands; the court dismissed out of hand any problems that mainland clients might have in reaching the Islands, explaining that "the advent of telecommunications, jumbo jets and data processing" services have stripped banks of any "justification for protective venue." *Tradewinds, Inc. v. Citibank, N.A.*,18 V.I. 93, 98 (D.V.I. 1980).[13] Six years later, when the District Court decided this case, it did not ex-

[13]The Third Circuit reversed the decision in an unpublished opinion, but that fact does not diminish our citation of this case. The court of appeals did not disagree with the district court's assessment, but two of the three

plain why these services had deteriorated to such a point that a "protective" law for local lawyers was proper.

In short, whatever problems may exist with respect to air service or communications between the Islands and the mainland, they are not sufficient to justify a ban on non-resident bar members, and there is no basis to ventilate these issues at a trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 1988

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judges thought that the case was controlled by a prior panel ruling which could only be reversed by the *en banc* court; the third judge would have affirmed the district court. No. 81-1424 (27 July 1981).

REPLY

BRIEF

Nos. 87-1939 and 87-2008

In The

Supreme Court of the United States

October Term, 1988

GEOFFREY W. BARNARD, AS CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS,

Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,

Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,

Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. FRAZIER AND PIPER MUST NOT BE EXTENDED TO ELIMINATE CONSIDERATION OF FACTUAL SETTINGS AND LEGITIMATE LOCAL INTERESTS.

In discussing *Piper* and *Frazier* the respondents contend that the Virgin Islands Committee of Bar Examiners, the Virgin Islands Bar Association, and the Government of the Virgin Islands as *amicus curiae*, simply echo the assertions of the states of New Hampshire and Louisiana, but this overstates by far the similarity in the situation presented here and the situations at issue in the litigation involving those states.[1] It is not the contention of the Virgin Islands that non-resident lawyers are less likely to remain familiar with local rules or laws than non-residents because it is assumed in any way that the former would be less diligently devoted to their profession. It is the contention of the Virgin Islands that while lawyers in the continental United States may have ready access to the legal reference materials necessary to remain familiar

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[1]Even the early commentators, whose urging to reexamine state bar residency rules under the Privileges and Immunities Clause preceded *Piper*, acknowledged that the unique circumstances of the Virgin Islands might warrant different rules. "The validity of true continuing residency rules which are based on these policies will have to be considered on a case by case basis. The state's interest in the continuing residency of its attorneys may become substantial where, for example, the inconvenience caused by nonresident lawyers is more than de minimis or where the safeguards owed to criminal defendants are not adequately provided for by nonresident attorneys. For example, a continuing residency rule might be justifiable in the Virgin Islands since airline passenger space from the mainland is scarce and telephone service substandard." Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 Harv. L. Rev. 1461 (1979).

with local rules or laws, the same does not apply to the laws and rules of the off-shore territories whose legal reference materials are not readily available outside the jurisdiction of the distant territory. Similarly, it is not the contention of the Virgin Islands that non-resident lawyers are less likely than resident lawyers to behave ethically. It is, rather, the contention of the Virgin Islands that non-resident lawyers are less accessible than residents to a small territorial committee of volunteers of the bar association whose duty it is to supervise the ongoing ethical behavior of admitted lawyers. While it is true, as the respondents point out, that the Committee of Bar Examiners has generally followed the practice of subscribing to the service of the National Conference of Bar Examiners for purposes of conducting initial screening of applicants for admission, it is wholly impractical to suggest that the bar association, which handles all subsequent matters involving ethics and grievances, should continue to do so quarterly or annually thereafter in order to insure that lawyers, once admitted, maintain their professional standing and have not been guilty of unethical conduct elsewhere.

It is the contention of the Virgin Islands that non-resident lawyers will be less likely than resident lawyers to be available for court appearances, especially those called on short notice. If it is the contention of the respondents that this concern is not well founded, there is absolutely no adequate factual record below to sustain any such contention. Clearly those who live in the Virgin Islands, even if they occasionally take a vacation, will be substantially better able to appear for court hearings on short notice than their colleagues who reside in the continental United States. Even the latter will presumably on

occasion take a vacation and be away from their base office, but it is not that occasional absence from the office that concerns the Virgin Islands. It is the permanent absence from the territory, not for a week or two during the year, but for virtually every day during the year, rendering non-residents consistently unavailable for court appearances, especially on short notice, that makes the distinction between the two categories of practitioners reasonable and necessary.[2]

Finally, it is not the contention of the Virgin Islands that non-resident lawyers are less likely than resident lawyers to do pro bono work. Rather, the contention is that non-resident lawyers will be unable to fulfill their share of the responsibility in the Virgin Islands to represent indigent criminal defendants whose legal representa-

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[2]The Virgin Islands are not only unlike the contiguous states in the islands' great distance from the rest of the nation. It is also unlike the non-contiguous states, where distances *within* the states may approximate even the substantial distance from the nearest state where a non-resident might live. For example, difficulties in making prompt, short notice appearances in Juneau may be nearly as great for a lawyer residing in Fairbanks as for one residing in Seattle. *Noel v. Alaska Bar Assoc.*, 659 P. 2d 241 (1982). This illogic in differentiating between residents and non-residents in Alaska, however, does not apply to the Virgin Islands where all residents of the territory are within approximately 40 miles of each other and all courts. Neither do the non-contiguous states, with their larger populations and more developed economies, report particular difficulty with mail or telephone communications. *Id.* Furthermore, unlike the rule disapproved in Alaska, which allowed non-residence among active bar members after admission, the Virgin Islands rule is equally applicable before and after admission. Admitted members who move their residence to the states are redesignated inactive members, and can only practice on a *pro hac vice* admission unless they resume residence. V.I. CODE ANN. Tit. 5, App. V, Rule 51 (1982) Jt. App. 40.

tion has become the responsibility in large part of the private bar. This argument is not the argument presented by the states in *Frazier* and *Piper* which was, apparently, to the effect that non-residents might be more likely to devote their attention in *pro bono* work to their home jurisdictions rather than to their neighboring states of admission. The inclination of a non-resident lawyer to share his legal abilities with all states and all territories in which he is admitted to practice cannot conceal the fact that whenever he might contemplate performing *pro bono* services in the Virgin Islands he would have to expend substantial monies for long distance airfare, being away from his practice for not only the period of time necessary to do the legal work but the substantial period of time consumed by travel, and in general would face material obstacles to a natural inclination to share his services with the needy in the Virgin Islands.

In any event, it is a primary contention of the Virgin Islands, unlike the jurisdictions at issue in the other matters, that the long-standing responsibility of the private bar of the Virgin Islands to take a primary role in providing defense to criminal defendants who are indigent, whether or not the practitioner is commonly considered a litigator, makes the non-resident readily distinguishable from the resident lawyer, and less likely for reasons of practical inaccessibility than his resident colleague, to be in a position to fulfill this responsibility.

Petitioners do not ask the Court to assume that a non-resident—any more than a resident—would disserve his clients by failing to familiarize himself with the rules or laws in effect in the jurisdiction in question, but the facts surrounding the unique situation of the offshore territory make it apparent that a non-resident lawyer could not do so in the Virgin Islands in any practical and reliable way. The issue is not one of comparative character or dedication, but of feasibility.

In arguing the case for admission of non-residents in *Piper*, the applicant emphasized repeatedly the significance of her proximity to the state bar of choice and the consequent irrationality of the rule as made applicable to her. Now the respondents argue, in an unwarranted effort to extend the holdings of *Piper* and *Frazier*, that even non-residents residing thousands of miles from the jurisdiction in question are entitled to outright admission to the bar and their emphasis on the proximity of the applicants in *Frazier* and *Piper* has disappeared.

While the Court in *Piper* did recognize that even non-residents living in distant places could be admitted to state bars, it observed that very different rules would obviously be permissible for such distant non-residents. The suggestion of the Court in *Piper* was that lawyers living at a "great distance" from the state of license could be required by the rules to "retain a local attorney who will be available for unscheduled meetings and hearings." This is the practical effect of the Virgin Islands rule which permits non-resident lawyers to practice *pro hac vice* provided they retain local counsel who are available for unscheduled meetings and hearings. *Id.* While *pro hac vice* admission may not be as convenient to the non-resident as full blown admission without limitations or without requirement that the non-resident have local counsel associated with him, the Court has already recognized the legitimacy of a rule imposing the latter requirement in the relatively rare case of one residing at a great distance from the proposed state of admission. In

the Virgin Islands, however, the non-resident applicant residing in a distant state will not be the rarity foreseen in *Piper,* but the rule. Thus, the rules of practice must allow the territorial court the flexibility to manage this portion of the bar efficiently, and the only practical system for such management is the well established system of *pro hac vice* admissions.

While the respondents claim that none of the states continue to impose a residence requirement, stating that Hawaii apparently amended its rules to eliminate this requirement after *Piper* was decided, and that while the rules of admission for Puerto Rico have not been officially amended, according to a telephone call to the clerk's office, that court "is admitting non-residents," we can only conclude from this description of the state of the rules on residence among the states and territories that there is a widespread belief that *Piper* and *Frazier* have eliminated any discretion in the outlying areas of the United States to consider residency in determining admission to the bar. Brief for Respondents p. 23. It is more likely that they, like the Third Circuit, have understood these two cases to create a *per se* rule of prohibition, but if the opinions in *Piper* and *Frazier* are over-inflated to extinguish all consideration of local circumstances, the entire analysis of important factual predicates in those decisions is overlooked.

Respondents also argue that the Committee has not defended Rule 56(b)(4) of Title 5, App. V of the Virgin Islands Code which provides for prior residence in the territory for a period of one year before admission. The reason this rule has not been discussed in any substantive way by the petitioners is that the applicants for admission to

the bar in this matter have always acknowledged that they have no intent to become residents of the Virgin Islands. Accordingly, if they are correct that the prospective simple residency requirement is invalid, they are obviously entitled to admission and the prior residency requirement cannot stand. However, if they are incorrect and the prospective residency requirement has been stricken by the court of appeals improperly, then they lack standing to challenge the one year prior residency rule since their acknowledgment of their lack of intention to become residents would make them ineligible for admission to the Virgin Islands Bar in any event. *Aronson v. Ambrose,* 9 V.I. 254 (D.V.I. 1972), *aff'd.* 479 F.2d 75 (3d Cir. 1973), *cert. denied,* 414 U.S. 854 (1973).

Thus, the prior residency requirement must rise or fall with the prospective simple residency requirement as to these applicants. If the prospective residency requirement is valid, any challenge to the prior residency requirement should be presented by one with standing to challenge the rule, namely, someone who does intend to become a resident of the territory but who does not meet that rule.[3]

II. THE FACTUAL DISTINCTIONS BETWEEN LEGAL PRACTICE AMONG THE STATES AND THE VIRGIN ISLANDS JUSTIFIES A RESIDENCY REQUIREMENT.

The applicants dismiss the important distinctions between the Virgin Islands and the mainland United States,

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[3]For the same reason, arguments put forth by the *amici* urging affirmance, must be limited to the standing of the actual parties to raise the issue.

but in doing so they reveal the inability of lawyers, accustomed to practice in a mainland state, to appreciate the extent to which a small American territory differs from their place of usual practice.

For example, with respect to the argument that mail service between the Virgin Islands and the mainland is "at mainland standards," the applicants exhibit their lack of familiarity with the Virgin Islands. It is not merely that mail service between the continental United States and the Virgin Islands is so inadequate that it has required congressional investigation. Neither is the fact that mail delivery *between* the islands is also objectionable a reason for failing to acknowledge the substantial differences between residents and non-residents in respect to feasible practice. In fact, in order to insure that lawyers practicing in the Virgin Islands receive orders of the court on a timely basis the District Court of the Virgin Islands and the Territorial Court of the Virgin Islands have been forced to adopt the practice of establishing physical mail boxes for each practicing lawyer in the clerks' offices into which the clerks insert all orders and notices relating to that lawyer.

The lawyers are required to check their mail boxes daily and this is normally accomplished by messenger. Obviously, this method does nothing for the non-resident who could not conceivably check his mailbox daily. Thus, the inadequacy of mail deliveries between the Virgin Islands and the United States and between the islands themselves has been the source of necessary local innovation, but to suggest that somehow the non-resident would be equally able to serve his clients, and to timely receive

notices, or that the court should be put in the position of having to anticipate the frequent lack of notice to non-resident lawyers of orders and proceedings, because of the failure of mail to reach the non-residents on a timely basis, is unworkable and an indefensible burden on the court system.

In dismissing problems of adequate legal research and ability to remain current on developments in territorial law, the respondents also note that the pocket parts for the Virgin Islands Code designated for use in 1988, arrived in the offices of counsel for the respondents in March of 1988. However, the significance of the date of receipt of a pocket part intended for this calendar year can be overlooked if one notes only the date on the front of the pocket part, which identifies the period for which it is intended for use. The pocket supplement for the calendar year 1987 "for use in 1988" includes only legislation adopted by the 1986 sessions of the Virgin Islands Legislature. (See preface to 1986 cumulative supplements Virgin Islands Code, Annotated, Equity Publishing Corporation, Oxford, New Hampshire). Thus, one who relies upon the cumulative pocket supplements to the Virgin Islands Code as a basis for legal representation of clients in the Virgin Islands would necessarily be left with the laws as they stood at the end of calendar year 1986, and would risk inadequate representation for clients as well as misleading citations to the court.

Similarly insufficient consideration is given to the legitimate problems of the territory already existing which would be a virtually insurmountable bar to effective practice for non-residents. For example, it is argued that if

the publication of court opinions or session laws is unduly delayed, the Government can simply award the contract to another publisher. This assumes, obviously without inquiry, that there are many legal publishers longing for the business of publishing this small code. Similarly, it is argued that if telephone service to the Virgin Islands is insufficient "its Public Service Commission can switch telephone carriers . . ." Brief of Respondents p. 26. This assumes that there are other telephone carriers in the territory to whom the franchise could be awarded, or that there are not existing contractual rights in favor of the local telephone company which entitle it to the exclusive right to serve the territory. Neither assumption is correct. See *Atlantic Tele-Network Co. v. Public Services Commission,* 841 F.2d 70 (3d Cir. 1988). These are the kinds of totally impractical suggestions which only someone who will not have the responsibility to make the territorial society function could make, knowing that he will not have the burden of carrying out any such suggestion as a practical matter.

Also, DeVos discounts unique cultural and linguistic aspects of Virgin Islands practice, pointing out the recent death of a respected individual thought to be the last fluent speaker of Dutch Creole in the territory. Brief of Respondents p. 37, n.12. It is understandable that persons who have not resided in the islands would fail to understand that while Dutch Creole remains an important historical influence on modern linguistics in the Virgin Islands, it is English Creole which is widely spoken today throughout the Virgin Islands and English speaking Caribbean. It is English Creole which has caused visiting

lawyers and court reporters on occasion to require translators.

The applicants then make the surprising statement that they do not doubt that some lawyers may be asked to handle three or four criminal cases a year in district court "either because they seek these assignments or because the judges trust their trial skills, but that is a matter of choice." There is absolutely no basis for this assertion in the record. In particular, there is no factual record of any lawyer ever having *asked* the District Court of the Virgin Islands for an assignment to represent an indigent, an undertaking in which the compensation to the lawyer is nominal and the time and expense involved is substantial.

The fact that the district court has consistently required that each lawyer bear his share of the responsibility for representation of the indigent, and not simply hire a mercenary substitute to handle his cases for him, is a part of the court's policy for requiring that not only the young and inexperienced lawyers but the highly successful take their share of the responsibility to assist the needy in the community. There can be no doubt that the non-resident lawyer would prefer to hire someone to stand in for him if this responsibility is not to be extinguished in his case altogether. However, there is a profound risk that if certain lawyers are not required to fulfill a responsibility to serve the needy in the same way as the majority of their counterparts, there will develop within the bar a two-class society in which the non-residents are a privileged group taking no personal responsibility for the representation of the indigent in the community.

The issue posed in respect to this rule is very direct and of importance in the Virgin Islands: May all mem-

bers of a bar, including affluent and struggling, sought-after and unknown, busy and beginners, be required to take fair and equal shares of the responsibility to represent the indigent? If this duty is and can be made an individual responsibility, then the contentions of the non-residents that they should be entitled to admission without respect to their inability to appear to represent criminal defendants upon appointment is an admission that residency is a legitimate consideration in determining admission to the bar of the territory.[4]

The applicants for admission urge that the affidavits filed by the Chairman of the Committee of Bar Examiners, who also serves as the Magistrate of the District Court, and by the President of the Bar Association, were too conclusory in nature to raise any issue of material fact when cross-motions for summary judgment were decided, citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986).

The affidavits did, in fact, address general problems of inadequate transportation, communication and accessibility. Considering his own affidavit more specific, DeVos sees the Committee and the Bar as having effectively conceded the motion, but there are problems with this analysis. First, it is not a single individual's claim to having experienced adequate flight availability and telephone connections that is at issue, but the general experience of an entire community which is of concern. If his experience is accurately described, it is still only one person's experience and obviously does not coincide with that of others dealing constantly with the Virgin Islands, as the other affidavits make clear. When DeVos turns in his affidavit to claims about "the best served commuter routes in this country . . . between the Virgin Islands and the airline 'hub' at . . . Puerto Rico" (Jt. App. 33) he does so without any foundation or evidentiary predicate and obviously that claim would not have constituted a matter of personal knowledge, nor did the affidavit "show affirmatively that the affiant [was] competent to testify . . ." to those matters. Fed. R. Civ. P. 56(c). Any dispute about the adequacy of the affidavits to support summary judgment should be resolved with a remand to the district court for trial on the merits.

If the factual disputes about these matters are of relevance, then it may indeed be said, as the dissent in the court of appeals suggested, that a more complete factual record is necessary and a remand for trial may be required. What cannot be fairly said is that the applicants are entitled to ask this Court to assume that the facts they contend to be true are in fact true without the need to prove them before a court at trial.

III. THE UNINCORPORATED TERRITORIES SHOULD BE ACCORDED A DEFERENTIAL STANDARD OF JUDICIAL REVIEW.

Respondents correctly point out that the Petitioners failed to note a recent decision of the Ninth Circuit re-examining its long-standing rule of deference for decisions

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[4]Now the applicants concede that the district court may require all members of the bar, resident and otherwise, to supplement the work of the Federal Public Defender in handling appointed cases. Brief of Respondents p. 26. This, however, was not the position of the applicants before the Third Circuit where they contended that the rule requiring such representation should be stricken along with the rule of residence. Pet. App. 8a n.4.

of the District Court of Guam. *Guam v. Yang,* 850 F.2d 587 (9th Cir. 1988).[5] However, that decision makes all the more important this Court's review of the appropriate standard for review on appeal of the decisions of the culturally diverse unincorporated territories.

In *Guam v. Yang,* the Ninth Circuit revealed its decision to renounce the deferential standard of review for the Appellate Court of Guam, and to join the Third Circuit in applying the strict *de novo* standard which the latter circuit has applied to the Virgin Islands. *Saludes v. Ramos,* 744 F.2d 992 (3d Cir. 1984). This decision leaves the First Circuit alone in following the standard of deference prescribed by this Court in *Fornaris v. Ridge Tool Co.,* 400 U.S. 39 (1970). There is good reason now to prescribe a rule of uniform and respectful deference for the decisions of the district courts of the territories in matters of interpretation of local law and in the fashioning of local rules of practice.

Guam v. Yang emphasized that the Guamanian decision on review came not from a district court judge in Guam, but from a three judge appellate division, at least two of whom by law were forbidden to be judges of a court of record of Guam. 850 F.2d at 509 n.3, (citing 48 U.S.C. § 1424-3(b)). Thus, the Court of Appeals reasoned, "there [was] simply no basis for assuming that visiting judges—even when from the nearby Northern Mariana Islands—

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[5]Like other mail, volumes of the Federal Reporter are often long delayed in their transit from the mainland to the Virgin Islands, and we regret our lack of access to this opinion when our initial brief was filed.

have any greater familiarity with local Guam law and/or customs than do the judges . . ." of the Ninth Circuit. Thus, deference to the appellate division's determination of local law was found unwarranted. 850 F.2d at 510.

Further, the Ninth Circuit gave no consideration to the opinions of this Court in *Fornaris* or *Bonet v. Texas Co.,* 308 U.S. 463 (1940), which had adopted a standard of particular deference for review of decisions of the courts of Puerto Rico. The Third Circuit in *Saludes* did recognize the existence of the line of cases including *Fornaris* and *Bonet,* and quoted from the particularly apt opinion in *DeCastro v. Board of Commissioners,* 322 U.S. 451 (1944), reviewing a decision of the Puerto Rico Supreme Court:

> A federal appellate court has ". . . the peculiarly delicate task of examining and appraising the local law in its setting, with the sympathetic disposition to safeguard in matters of local concern the adaptability of the law to local practices and needs. It is one which ordinarily cannot be performed summarily or without full argument and examination of the legal questions involved. But if in the light of such an examination it is found that the rule adopted by the local tribunal is an intelligible one, not shown to be out of harmony with local law or practice, it is not to be rejected because we think a better could have been devised or because we find it out of harmony with our own traditional system of law and statutory construction."

322 U.S. at 458-59.

The Third Circuit believed that rule had been applied only to decisions of insular courts of appeal (specifically the Hawaii or Puerto Rico Supreme Courts, coexisting with separate federal judicial systems) and implied that

the rule was inapplicable, for example, to decisions of the district court in Puerto Rico. It viewed the policy of deference as no more than a companion to the rule of deference to state supreme courts. In fact, however, the First Circuit has consistently applied the rule to decisions of all the courts of Puerto Rico, including the United States District Court. *Gual Morales v. Hernandez Vega*, 604 F.2d 730 (1st Cir. 1979). In electing to follow the Third Circuit in this divergence of views, the Ninth Circuit apparently believed the greater deference to Puerto Rican decisions arose because: (1) the district court there sits only as a true U.S. District Court and not as hybrid trial/appellate court, as the District Courts of the Virgin Islands and Guam do; and (2) the district court judges in Puerto Rico are "generally citizens of Puerto Rico" very familiar with the Spanish traditions underlying Puerto Rican law. 850 F.2d at 511, n. 7. This analysis is clearly at odds with the Third Circuit's view that the deferential standard in the Puerto Rican cases applies *only* to appellate tribunals and not to a court, like the District Court of the Virgin Islands, that frequently "serves as the trial court and interprets territorial law in the first instance." 744 F.2d at 994.

Neither the Third Circuit in *Saludes* nor the Ninth Circuit in *Guam v. Yang* give any consideration to the true policy underlying the Puerto Rican cases, as articulated in *Fornaris* and *DeCastro*. In the unincorporated territories (which Puerto Rico was in 1944 when *DeCastro* was decided) the Court had prescribed particular deference to those local courts where knowledge of local tradition, culture and practice among jurists led to "the sympathetic disposition to safeguard in matters of local concern the

adaptability of the law to local practices and needs." 322 U.S. 451, 458.[6] Failure to accord such deference to those courts had previously led the Court to recognize the "delicate problems" inherent in permitting construction of laws "impregnated with the Spanish tradition" by higher courts applying "Anglo-Saxon traditions," leaving "little room for the overtones of Spanish culture." *Fornaris v. Ridge Tool Co.*, 400 U.S. at 42-43.

That policy suggests the need to adopt a uniform deferential standard of review for all unincorporated territorial court decisions on matters of local law and practice. Such a standard, if applied here, would clearly warrant sustaining the local rule at issue. This is true not because the territories can interpret the Constitution in a manner inconsistent with this Court's opinions, but because in the application of the Privileges and Immunities Clause this Court has recognized the importance of allowing local jurisdictions "considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). In that role, the Virgin Islands and all unincorporated territories should be accorded the deference promised in *Fornaris*.

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[6]The District Court of the Virgin Islands is, of course, a part of the judicial branch of the Virgin Islands, rather than the United States. 48 U.S.C. § 1611(a). See also, *Territorial Court of the Virgin Islands v. Richards*, 847 F.2d 108 (3d Cir. 1988), *Petition for Cert.* filed (No. 88-328).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully Submitted,

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AMICUS CURIAE

BRIEF

(3)

No. 87-1939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GEOFFREY W. BARNARD, AS CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS,
Petitioner,

v.

SUSAN ESPOSITO (THORSTENN) AND LLOYD DE VOS,
Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE GOVERNMENT OF THE VIRGIN ISLANDS, EX REL. GODFREY R. de CASTRO, ATTORNEY GENERAL OF THE VIRGIN ISLANDS AS AMICUS CURIAE

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BRIEF FOR THE GOVERNMENT OF THE VIRGIN ISLANDS, EX REL. GODFREY R. de CASTRO, ATTORNEY GENERAL OF THE VIRGIN ISLANDS AS AMICUS CURIAE

INTEREST OF THE GOVERNMENT OF THE VIRGIN ISLANDS

Amicus respectfully files this brief in support of the Brief on the Merits filed by Petitioner Geoffrey W. Barnard, as Chairman of the Committee of Bar Examiners of the Virgin Islands. This brief is filed pursuant to Supreme Court Rule 36.4 and presented for the United States Virgin Islands ("Virgin Islands") sponsored by Godfrey R. de Castro, Attorney General of the Virgin Islands.

The Virgin Islands is an unincorporated territory of the United States. 48 U.S.C. Section 1541(a). The Virgin Islands is governed by the Revised Organic Act of 1954, Pub.L.No. 83-517, Ch. 558, 68 Stat. 497, 48 U.S.C. Section 1541 *et seq.* (1982 and Supp. III 1985). The Virgin Islands has the power to establish an appellate court and lower local courts. 48 U.S.C. Section 1611(a). The Virgin Islands has established as a court of local jurisdiction the Territorial Court of the Virgin Islands. 4 V.I.C. Section 2. Additionally, the Virgin Islands has the right to sue and be sued, 48 U.S.C. Section 1541(b), and as such is the major litigant in the courts of the Virgin Islands. The Virgin Islands has the power to enact laws for the protection of life, the public health and the public safety. 48 U.S.C. Section 1561. As creator and administrator of the local court system, major participant in litigation before the courts and the government body responsible for the public health, welfare and safety, the Virgin Islands has a fundamental interest in maintaining the integrity of the legal system by requiring residency for admission to the bar.

SUMMARY OF ARGUMENT

The residency requirement for admission to the Virgin Islands Bar represents a valid exercise of the authority of the District Court to regulate the practice of law and the administration of justice in the Virgin Islands. Due to the unique circumstances inherent to the Virgin Islands, the residency requirement serves to ensure accessability and accountability of attorneys to their clients and to the courts. The cost to the people of the Virgin Islands of allowing the admission of nonresident attorneys to the bar far outweighs any discrimination resulting against nonresidents. The residency rule does not violate the Privileges and Immunities Clauses where residency in such a distant and isolated geographic location is necessary to effectuate the efficient administration of justice in the Virgin Islands.

ARGUMENT

I. THE VIRGIN ISLANDS RESIDENCY RULE IS CONSISTENT WITH THIS COURT'S HOLDINGS IN THE RECENT BAR RESIDENCY CASES.

This Court has clearly enunciated its view that the Privileges and Immunities Clause of the United States Constitution (Article IV, Section 2) requires that a "State may not discriminate against nonresidents unless it shows that such discrimination bears a close relation to the achievement of substantial State objectives." *Supreme Court of Virginia v. Friedman*, 56 U.S.L.W. 4669, 4672 (June 21, 1988). The Privileges and Immunities Clause has been extended to the Virgin Islands through the Bill of Rights of the Revised Organic Act of 1954. 48 U.S.C. Section 1561. The residency requirement for admission to the bar is so closely related to the integrity of the legal system of the Virgin Islands as to withstand judicial scrutiny.

Rule 56 of the District Court of the Virgin Islands, 5 V.I.C. App. V, R. 56, requires that an applicant for admission to the bar must be a resident of the Virgin Islands for one year and must intend to continue to reside in the Virgin Islands. In affirming the validity of Rule 56, the District Court of the Virgin Islands recognized that exclusion of nonresidents impinged upon rights protected by the Privileges and Immunities Clause. App. C, p. 63a.[1] The District Court then went on to analyze the discrimination to nonresidents against the purpose for the bar residency rule. App. C, pp. 64a-67a.

The District Court found that substantial reasons exist for the exclusion of nonresidents: the interest in promoting the speedy and efficient administration of justice, the geographic isolation of the Virgin Islands and the

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[1] All references to the Appendix refer to the Appendix filed in the Petitions for Certiorari.

problems incident to travel from the continental United States, erratic telephone and mail service between the Virgin Islands and the continental United States, the inability of nonresidents to keep abreast of developments in the law due to lack of publication of recent statutes and court opinions, the ever-increasing caseload of the courts of the Virgin Islands, the rule requiring mandatory appointment of bar members in criminal cases, and the lack of ability to evaluate and monitor the ethical conduct of attorneys who reside many miles from the Virgin Islands. The District Court found that any discrimination existing against nonresidents under Rule 56 was the least restrictive means of preventing the harm which would ensue by admitting nonresidents to the bar.

The District Court's analysis is consistent with Supreme Court holdings concerning residency challenges under the Privileges and Immunities Clause. Discrimination against nonresidents does not violate the Clause when there is a substantial reason for the difference in treatment and the degree of discrimination is substantially related to the government purpose. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 272, 284 (1985), citing *Toomer v. Witsell*, 334 U.S. 385 (1948) and *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984). The recent bar residency cases, *Friedman* and *Piper*, recognized a two-pronged analysis to be utilized by the courts in examining residency challenges under the Privileges and Immunities Clause. In *Friedman*, this Court stated the analysis as follows:

> "First, the activity in question must be 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause" . . . Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement

> of a substantial state interest." 56 U.S.L.W. at 4670 (citations omitted).

This Court answered the first question affirmatively in *Piper*, holding that the practice of law is protected by the Privileges and Immunities Clause. 470 U.S. at 280-281. It is the second prong of the analysis—whether the restriction of residency is closely related to a substantial state interest—upon which the Virgin Islands relies in support of its argument that the bar residency rule does not violate the Privileges and Imunities Clause.

The Court of Appeals failed to apply the second step of the analysis in its decision below. Rather, the Court of Appeals applied its supervisory power, following *Frazier v. Heebe*, 107 S.Ct. 2607 (1987), to invalidate the bar residency rule. In *Frazier*, this Court asserted its supervisory power to analyze the arguments raised in support of the residency rule of the Eastern District of Louisiana to deterine whether the rule served any necessary or rational purpose. Such an examination by the Court is consistent with the application of the second prong of the Privileges and Immunities Clause analysis. *See Frazier*, 107 S.Ct. at 2612, n. 7. In the instant case, however, the Court of Appeals merely concluded that the reasons advanced for the Virgin Islands residency rule were the same reasons rejected in *Frazier* and therefore must also be rejected. The Court of Appeals failed to discuss the unique circumstances or substantial interests offered to justify the Virgin Islands residency rule. Such summary invalidation of the residency rule is inconsistent with the holdings of this Court on Privileges and Immunities Clause challenges.

In the most recent residency case, *Supreme Court of Virginia v. Friedman*, 56 U.S.L.W. 4669, this Court applied the Privileges and Immunities Clause analysis without resorting to the supervisory power rationale and reaffirmed its prior rulings that the Privileges and Immunities Clause is not absolute. *Supreme Court of New*

Hampshire v. Piper, 470 U.S. at 284; *United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. at 222; *Toomer v. Witsell*, 334 U.S. at 396. Disparity of treatment is not prohibited if "substantial reasons exist" for the discrimination and the degree of discrimination "bears a close relation" to the reasons. *Friedman*, 56 U.S.L.W. at 4671. The Court of Appeals erred in asserting its supervisory authority to invalidate the bar residency rule rather than applying the analysis utilized by this Court in challenges to residency rules under the Privileges and Immunities Clause. The Court of Appeals should have considered the substantial reasons for the bar residency rule, as advanced by the District Court in its decision below. The unique character of the Virgin Islands provides circumstances that are not analogous to those proffered and rejected in *Piper*. The circumstances under which Petitioner labors in the Virgin Islands meet the test of the second prong of the Privileges and Imunities Clause analysis, and bear such a close relation to the efficient administration of justice in the Virgin Islands that no violation of the Privileges and Immunities Clause exists as to nonresidents.

II. THE BAR RESIDENCY RULE SERVES A SUBSTANTIAL INTEREST.

The bar residency rule is directly related to specific, identifiable barriers to the practice of law in the Virgin Islands which distinguish one group of attorneys, residents, from another group of attorneys, nonresidents. The accessibility and accountability of attorneys to their clients and to the courts directly affect the political and economic interests of the people of the Virgin Islands. As such, residency is a proper subject for regulation which is substantially related to the promotion of those interests.

The reasons offered by the District Court below in support of the bar residency rule are of a different nature

than those reasons found to be invalid in the recent bar residency cases. No reason offered by Petitioner goes to the status of nonresidency as such. There is no argument that resident attorneys should be promoted over nonresidents or that nonresident attorneys are less qualified or less ethical than resident attorneys. The bar residency rule is a recognition of the realities of life and legal practice in the Virgin Islands. Those realities lead to the logical conclusion that residency is necessary to effectuate the efficient administration of justice.

The Virgin Islands is a unique jurisdiction, for which assumptions concerning the practice of law in the contiguous United States cannot easily be accepted. A review of this Court's recent bar residency cases is illustrative. In *Friedman*, *Piper* and *Heebe*, the nonresident attorney challenging the residency rule was from a contiguous state and resided close to the state border. In *Friedman* and *Piper*, the nonresident attorneys practiced full-time in the nonresident state. Such is not the case with nonresident attorneys seeking to practice in the Virgin Islands. *See Sestric v. Clark*, 765 F.2d. 655 (7th Cir. 1985), *cert. denied* 106 S.Ct. 862 (1986); (distinction made by state that nonresident attorney seeking admission to bar was likely to be contemplating two-state practice, while attorney who became resident was likely abandoning his old practice and establishing new one in the state did not offend the Privileges and Immunities Clause). The rationales concerning the modern ease of travel across state borders and recognition of metropolitan areas which expand across state borders have little application to the Virgin Islands.

The recent bar residency cases also considered and rejected the reason offered that nonresident attorneys are less competent and less ethical than resident attorneys. *Piper*, 470 U.S. at 285-286; *Frazier*, 107 S.Ct. at 2612. Petitioner makes no such argument.

In *Piper* and *Friedman*, it was argued that nonresident attorneys are less likely to become familiar with local law, rules and procedures. This Court found that assumption to be invalid. In the instant case, the argument is made, not that nonresident are less likely to become familiar with local law, but that no legal publications containing the most recent laws and amendments and court opinions exist which nonresidents could rely upon to keep them updated on local developments in the law.[2] *See* District Court Memorandum Opinion, App.C, p. 65a.

The argument that nonresident attorneys are less likely to be available to the court was found to be nonmeritorious by this Court in *Piper*. This Court held that less intrusive alternatives than prohibiting nonresidents from practicing law exist (i.e. conference telephone calls, *id.*, at 286, n. 21; assumption that nonresident attorneys will live in places convenient to the state, *id.*, at 287). These and other alternatives suggested by the Court (except perhaps for the adoption of a rule requiring retention of local attorneys for unscheduled meetings and hearings), are unavailable or unreliable, at best, to the Virgin Islands. *See* District Court Memorandum Opinion, App. C, p. 65a, regarding telephone service between the Virgin Islands and the continental United States; *see also* Court of Appeals in Banc Opinion, Higginbotham, J. dissenting, App. A.

While it might be possible to adopt alternative rules and procedures which would have no impact on nonresident attorneys, to do so would be at significant cost to the people of the Virgin Islands and in particular resident attorneys. The expense and delay of long-distance communication (via telephone and mail) will be borne by the court system and resident attorneys. It is probable that the court will rely upon the more accessible resident attorneys to resolve problems arising during litigation, placing an undue burden on resident attorneys. Any alternative rules and procedures designed to accommodate nonresident attorneys would have the effect of delaying the administration of justice for Virgin Islands litigants. This would stand the Privileges and Immunities Clause analysis on its head, subjugating the interest of the Territory and its residents to nonresidents. *See United Building & Construction Trades Council v. Mayor of Camden*, 465 U.S. at 217, n. 9; (the effect on residents of discrimination against nonresidents is relevant to evaluating the Privileges and Immunities Clause). This Court has consistently stated that a residency rule will be invalidated "only if we conclude that the restriction is not closely related to the advancement of a substantial State interest." *Friedman*, 56 U.S.L.W. at 4670.

> "In deciding whether the degree of discrimination bears a sufficiently close relation to the reasons proffered by the state, the Court has considered whether, within the full panoply of legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns." *Id.*, at 4671.

No alternative means exist within the control of Petitioner or the Virgin Islands to improve telephone and mail service, air travel, the frequency of publication by private legal publishers, the increase in litigation in our society and the backlog of cases in the courts, and least of all the geographic distance between the Virgin Islands and the continental United States. The circumstances of this case are precisely those which define when discrimination against nonresidents is allowed by the Privileges and Immunities Clause.

In the Virgin Islands, attorneys are required by rule, 5 V.I.C. App. V R. 16, to provide legal services to indigent defendants in criminal cases on a rotational basis.

[2] Resident attorneys rely upon informal notice through word-of-mouth or press reports to keep abreast of recent developments in local case law.

The mandatory court appointment rule is an important component of the administration of justice in the Virgin Islands. The rule will lack vitality if applied to nonresident attorneys, who are not readily accessible and available to the court and their appointed clients. The burden will fall on resident attorneys to provide all court-appointed legal services. Again, the assumptions made by this Court with regard to nonresidents sharing in their *pro bono* responsibilities, *Piper*, 470 U.S. at 287, are not applicable to the geographically isolated Virgin Islands. Alternative provisions, merely to accommodate nonresident attorneys, do disservice to the people of the Virgin Islands and the bar.

III. THE EFFICIENT ADMINISTRATION OF JUSTICE IS A SUBSTANTIAL REASON FOR THE BAR RESIDENCY RULE.

The bar residency rule cannot be reviewed in a vacuum without consideration of the practical effect of allowing nonresident members of the bar. The cost, financial and otherwise, to the judicial system and the Virgin Islands would be disproportionate. While telephone conference calls and express mail have become part of the practice of law in the continental United States, these conveniences, though available, are often not reliable in the Virgin Islands and would impose an additional cost on the practice of law.

Service of pleadings upon nonresident attorneys will be cumbersome and delayed (or will the District Court be required to adopt a special rule for service of documents directly upon clients of nonresident attorneys). Exceptions to every court rule governing time periods for filing will have to be considered due to the unreliability of the mail service to the Virgin Islands.[3] Problems of availability of attorneys to the courts (which are common in any jurisdiction) will be compounded pending availability of airline flights to the Virgin Islands. The burden will therefore most likely fall on the resident attorney to keep the court informed of the status of litigation. Administration of a legal system wherein many practitioners are thousands of miles away would require an expertise and budget comparable to that of this Honorable Court. The Virgin Islands, with its limited financial resources, cannot physically sustain the burden.

[3] It is interesting to note that while the Court of Appeals rejected the arguments concerning the unreliability of mail service in the Virgin Islands, the Court of Appeals has most recently suggested that due to the "possibility that mail may be quite slow between the Virgin Islands" and the mainland, the District Court may wish to adopt a rule to address the problem of the time interval for mail between the mainland and the Virgin Islands. *Smith v. Evans*, No. 87-3761 (3d Cir., filed July 21, 1988), at p. 16a, attached hereto.

While this Court, in analyzing the government interest in residency requirements, has looked to see if alternative means to further the government interest are available, *Friedman*, 56 U.S.L.W. at 4671, it is important to consider whether the proposed alternatives are constitutionally required. *Sestric v. Clark*, 765 F.2d at 665 ("still not every good thing is constitutionally required"). It would be simple to review the bar residency rule in question and impose continental standards of legal practice and procedure when suggesting alternatives for the Virgin Islands. Such alternatives, however, are not constitutionally required.

In *Toomer v. Witsell*, 334 U.S. 385, this Court established the constitutional analysis to be applied to Privileges and Immunities Clause challenges. In reviewing disparity of treatment of nonresidents, the Court said:

> "The inquiry must also, of course, be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Id.* at 396.

Petitioners have developed procedural rules for the practice of law and admission of judicial officers in the Virgin Islands which consider the unique character of legal practice in the Virgin Islands. They have determined that because of numerous considerations, bar members should be residents. This decision, and the reasons therefor, does not violate the Privileges and Immunities Clause of the United States Constitution. Absent such violation, the local rules should be afforded deference and upheld.

CONCLUSION

For all of the above reasons, Amicus Curiae Government of the Virgin Islands respectfully requests that this Honorable Court reverse the decision of the United States Court of Appeals for the Third Circuit and affirm the decision of the District Court of the Virgin Islands.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3761

MERAL SMITH,
Appellant

v.

MELVIN H. EVANS, et al.,
Appellee

On Appeal From the District Court
of the Virgin Islands
(D.C. Civil No. 87-002)

Submitted Under Third Circuit Rule 12(6)
April 22, 1988

Before: SEITZ SLOVITER and BECKER,
Circuit Judges

(Filed July 21, 1988)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal presents a technical question of appellate jurisdiction. Appellant, a prisoner acting *pro se*, filed an untimely Fed. R. Civ. P. 59(e) motion to alter or amend the district court's judgment. Because only a timely Rule 59(e) motion will toll the time for appeal, we hold that the appeal, filed more than thirty days after the district court's judgment, was untimely. We will therefore dismiss the appeal without reaching the merits. In arriving at this conclusion, we discuss and reject three possible exceptions to this jurisdictional rule, which we acknowledge can be especially harsh in its effect upon *pro se* litigants.

First, because the motion was clearly labeled and considered a rule 59(e) motion and because it challenged a fundamental legal error that required the district court to reconsider its decision, we cannot construe the motion as a Rule 60(b) motion to relieve a party from mistake. In contrast, if Appellant's motion were indeed a 60(b) motion, the appeal would be timely, at least as to the issues raised in the 60(b) motion.

Second, because the court did not affirmatively assure Smith that his motion was timely or otherwise actively

mislead the Appellant as to the timeliness of his motion, we cannot, to the extent that it retains viability, apply the "unique circumstances" exception to this case.

Third, because we find that Smith's motion was out of time before he even gave the motion to prison officials to mail and that prison delay in mailing Smith's motion was not therefore a factor in Smith's making his motion out of time, we hold that the Supreme Court's decision in *Houston v. Lack*, 56 U.S.L.W. 4728 (U.S. June 21, 1988) (an appeal is deemed filed by a *pro se* prisoner at the moment of delivery of his papers to prison officials for mailing to the district court) cannot apply to the facts of this case.

I.

Meral Smith is an inmate at the Federal Correctional Institution at Lewisburg, Pennsylvania, where he is serving a lengthy sentence imposed by the District Court of the Virgin Islands. Following an initial period of incarceration in the Virgin Islands, Smith was transferred to the custody of the United States Bureau of Prisons. He was incarcerated at Lewisburg, remote from the office of the Clerk of Court in the Virgin Islands, pursuant to a contract between the Virgin Islands Bureau of Corrections (BOC) and the United States Department of Justice. That contract allows the director of the BOC to transfer certain territorial prisoners to the federal penitentiary system.

In an action brought *pro se* pursuant to 42 U.S.C. § 1983, Smith sought to enjoin enforcement of that contract, alleging that his confinement in the federal penitentiary system deprived him of access to the courts, specifically access to Virgin Islands law books, thereby causing him severe emotional distress. In his complaint, Smith sought compensatory and punitive damages as well as injunctive relief. Smith named several Virgin Islands government officials, including the director of the BOC,

as defendants. In their answer, the defendants interposed a number of affirmative defenses, including statute of limitations, good faith immunity, and failure to follow the procedure required by the Virgin Islands Tort Claims Act, 33 V.I.C. § 3401, *et seq.*

When the matter came before the district court on Smith's motion for preliminary injunction, the court denied the motion without a hearing. By order entered April 23, 1987, the court dismissed the complaint on two grounds. First, to dispose of the transfer issue, the court relied on *Bradshaw v. Carlson*, 682 F.2d 1050 (3d Cir. 1981) (per curiam), (territorial prisoners have no right to be confined within the territory). Second, it concluded that *Benjamin v. Potter*, 635 F. Supp. 243 (D.V.I. 1986), *aff'd mem.* 838 F.2d 1205 (3d Cir. 1988), which held that the government's obligation to provide meaningful access to the courts can be met *inter alia* by expanding the duties of local public defenders to include researching prisoners' claims, established that the Government of the Virgin Islands did not have to provide Smith with Virgin Islands law books.

On May 13, 1987, Smith served a motion, captioned a Rule 59(e) motion, to alter or amend the judgment. Despite the rigid 10-day requirement for serving a motion to alter or amend the judgment, this motion was served more than 10 days after the district court's dismissal. In the motion, Smith asserted that the court had misconstrued his complaint as seeking habeas corpus relief rather than money damages. He further argued that *Benjamin v. Potter* did not apply to the remedy he sought for *past* denial of access to Virgin Islands law books (Smith had been incarcerated at Lewisburg before the decision in *Benjamin*). Smith asked for a liberal construction of his complaint in view of his *pro se* status.

On May 20, 1987, acknowledging the receipt of Smith's Rule 59 motion but without explicitly granting it, the

court granted Smith leave to file an affidavit setting forth his alleged damages for emotional distress. Smith filed such an affidavit, but it stated no more than the bare allegation that "as a result of the mental anguish and actual injury that he has suffered during the past fourteen years (14 years), he is entitled to an award of $10,000,000.00 (ten million dollars) in damages against the defendants in the case at bar." App. at 37.

Upon consideration of Smith's affidavit, by order dated July 23, 1987, the court granted his motion for reconsideration and amended its judgment of April 23, 1987, awarding Smith nominal damages in the amount of $1.00. In its amended judgment the court gave as its reasons:

> Now the plaintiff has come forward with his affidavit. In it he states some emotional distress. We note, however, that the stress he alleges is more likely a result from his long 14-year prison confinement, than from any lack of books. Moreover, our decision in *Benjamin* has resolved his claims as to the future. We, therefore, consider any damages he may have nominal only, and will award him $1.00. This resolution precludes the necessity of considering any of the defendant's meritorious defenses.

Smith filed a renewed motion, timely served on July 30, 1987, to amend or alter the judgment, alleging that he was entitled to a jury trial on the damages issue. The district court denied the motion by order entered October 26, 1987 and this appeal followed. Because we find that we have no appellate jurisdiction, we do not consider the merits of Smith's claim that he deserved a trial on damages, or the appropriateness of the district court's apparent finding of liability (accompanied by an award of nominal damages) and its circumvention of meritorious defenses by so proceeding.

II.

Although it was raised by no party, we have a continuing obligation to examine our subject matter jurisdiction. *See Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326, 1331 (1986); *Lovell Manufacturing v. Export-Import Bank*, 843 F.2d 725, 729 (3d Cir. 1988).

A notice of appeal must be filed within thirty days of the date of entry of judgment. Rule 4(a)(1), Fed. R. App. P. A timely motion to alter or amend the judgment, pursuant to Rule 59(e), Fed. R. Civ. P., tolls the time for filing a notice of appeal. Fed. R. App. P. 4(a)(4). To be timely, the Rule 59(e) motion must be served within ten days of entry of judgment. The "ten day period is jurisdictional, and 'cannot be extended in the discretion of the district court.'" *de la Fuente v. Central Electric Cooperative, Inc.* 703 F.2d 63, 65 (3d Cir. 1983) (per curiam) (*quoting Gribble v. Harris*, 625 F.2d 1173, 1174 (5th Cir. 1980) (per curiam)). An untimely motion, even if acted upon by the district court, cannot toll the time for filing a notice of appeal. The ten day limit for filing a Rule 59 motion is clearly set forth in the Rule. It is equally clear that a district court may not extend or waive the ten day limit. Rule 6, Fed. R. Civ. P.; *de la Fuente*, 703 F.2d at 65. Because the May 13, 1987 motion to reconsider the April 23 order of dismissal was untimely, and did not toll the time for filing a notice of appeal, we must dismiss the appeal for lack of jurisdiction.

We acknowledge that Smith is before us *pro se*, hence we have searched for a means of relieving him from this harsh result. We have struggled with three possible theories all of which we ultimately found cannot salvage this untimely appeal.

A.

First, we have examined whether Smith's motion for reconsideration can be construed as a motion for relief

from judgment due to mistake, pursuant to Fed. R. Civ. P. 60(b)(1), which may be filed within a reasonable time, up to one year, after judgment. If it can be so construed, then its filing was timely. A Rule 60(b) motion is not one of the motions listed in Rule 4(a)(4), Fed. R. App. P., which tolls the time for filing a notice of appeal. Moreover, the grant or denial of a Rule 60(b) motion is an appealable order. Smith filed, within ten days, a motion to reconsider the July 24 order granting him $1.00 in damages, *see Eleby v. American Medical Systems*, 795 F.2d 411 (5th Cir. 1986) (reconsideration of an order disposing of a Rule 60 motion is permitted). and a timely notice of appeal from the order denying the motion for reconsideration. Accordingly, if the May 13 motion can be construed as a Rule 60(b) motion, then the court has jurisdiction to hear this appeal.[1]

The May 13 motion, however, is clearly a motion to alter or amend the judgment, pursuant to Rule 59(e), rather than a Rule 60(b) motion. Smith cites Rule 59(e) in the motion and calls it a "motion to amend or alter judgment." And in its order granting Smith twenty days to prove damages, the district court labeled Smith's motion as a "motion of the plaintiff pursuant to Fed. R. Civ. P. 59(e) to amend our judgment," treated it as a motion made pursuant to Rule 59(e) and referred to it as such in a later memorandum.

Because the function of the motion, not the caption, dictates which Rule applies, *see Turner v. Evers*, 726 F.2d 112, 114 (3d Cir. 1984), we do not rely solely on the fact that the appellant and the court both labeled the motion a 59(e) motion. However, it is apparent that Smith's motion not only possessed all the formal trappings of a Rule 59(e) motion, but served the purpose

[1] We note that even though 60(b) preserves the right to appeal, the appeal may bring up only the subject matter of the 60(b) motion and not the underlying case.

of one as well. In *Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R.*, 824 F.2d 249, 253 (3d Cir. 1987), this court described a Rule 59 motion as a "device to relitigate the original issue." We have also held that a Rule 60(b) motion may not be used as a substitute for appeal, and that legal error, without more, cannot justify granting a Rule 60(b) motion. *Martinez-McBean v. Gov. of the Virgin Islands*, 562 F.2d 908, 912 (3d Cir. 1977); *Moolenaar v. Gov. of the Virgin Islands*, 822 F.2d 1342, 1346 (3d Cir. 1987).[2]

It is clear to us that Smith's motion served the function of a Rule 59 motion. The purpose of the motion is to "relitigate the original issue"; the motion alleges no more than legal error and merely reiterates the arguments contained in the complaint. Because we determine that the motion is indeed a Rule 59(e) motion, it had to have been served within ten days of the entry of judgment. The order dismissing the complaint was entered on Thursday, April 23, 1987. To be timely, the Rule 59

[2] We note that an older case, Sleek v. J.C. Penny Co., Inc., 292 F.2d 256 (3d Cir. 1961) considered a motion alleging mistake of law, made after the 59(e) 10-day limit but within time for appeal, as a Rule 60(b)(1) motion. Although we certainly acknowledge the desirability of permitting a judge to correct his own errors before the time for appeal has elapsed, such a use of 60(b) is bound to breed confusion. The 59(e) ten-day requirement has been read strictly by this court and we would be ill-advised to provide a loophole via Rule 60(b). Furthermore, we note that the vitality of *Sleek* has been seriously undermined by Venen v. Sweet, 758 F.2d 117, 122 (3d Cir. 1985) ("For purposes of Fed. R. App. P. 4(a), this court regards a motion labeled only as a motion for reconsideration as the functional equivalent of a Rule 59 motion . . . to alter or amend a judgment") and West v. Keve, 721 F.2d 91, 96 (3d Cir. 1983) (60(b) motion cannot be used solely as a vehicle for evading the time constraint of Fed. R. App. P. 4(a)). Therefore, we will adhere to *Sleek*'s own limitation of its holding to the unusual facts involving a default judgment. *See Sleek*, 292 F.2d at 258 (distinguishing the facts of *Sleek* from reconsiderations of "principal judgments in which courts sitting without juries had disposed of the substantive claims in lawsuits").

motion had to have been served by Thursday, May 7, 1987. Smith's motion was not served until Wednesday, May 13, 1987. Because the motion to alter or amend the judgment was untimely, the period for filing a notice of appeal was not tolled. Smith did not file his notice of appeal until November 9, 1987; thus, we lack jurisdiction to hear his appeal. Moreover, this court lacks jurisdiction to determine the propriety of the district court's subsequent action in granting the motion since "any substantive action a court takes on an untimely motion is a nullity." *Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858, 861 (3d Cir. 1969).

B.

A second posible exception to the dictates of the Rule 59 timing requirement is the "unique circumstances" doctrine. In certain "unique circumstances" in which a litigant in good faith relies on a statement by a district court that a motion is timely, awaits disposition of the motion, and thereafter files a timely appeal, courts have found that jurisdiction exists to hear the appeal. Under an expansive theory of "unique circumstances," perhaps one could argue that Smith's perception that the district court was willing to entertain the motion (even though that motion was obviously late) served as a tacit message to Smith that his motion was timely. For the reasons that follow, we hold that the "unique circumstances" doctrine, to the extent it retains any vitality, does not apply here.

In *Thompson v. I.N.S.*, 375 U.S. 384 (1963) (per curiam), the appellant filed a motion for new trial twelve days after entry of judgment. The government made no objection and the district court explicitly stated that the motion had been made "in ample time," *Id.* at 386. The Court of Appeals for the Seventh Circuit dismissed the appeal as untimely. The Supreme Court reversed the dismissal of the appeal because the "petitioner did an act

which, if properly done, postponed the deadline for the filing of his appeal . . . the District Court concluded that the act had been properly done . . . the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." *Id.* at 387.

Some courts have construed the holding in *Thompson* strictly, requiring an explicit statement by the district court that the untimely motion was actually timely. *See Alvestad v. Monsanto Co.*, 671 F.2d 908 (5th Cir.) *cert. denied* 459 U.S. 1070 (1982); *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521, 1527-28 (11th Cir. 1987), (*petition for cert. filed* Jan. 15, 1988). Other courts have construed *Thompson* broadly, permitting an appeal when the district court, though not specifically stating a motion was timely, acts upon the motion, or grants an improper extension of the unwaivable time limits, thereby inducing the parties to believe the time to file a notice of appeal has been extended. *See Barry v. Bower*, 825 F.2d 1324 (9th Cir. 1987); *Wort v. Vierling*, 778 F.2d 1233 (7th Cir. 1985); *Stauber v. Kieser*, 810 F.2d 1 (10th Cir. 1982).

This court has rarely had occasion to dismiss the "unique circumstances" exception, but the few cases in which the doctrine is mentioned indicate that the exception is to be narrowly construed. *See de la Fuente v. Central Electric Cooperative, Inc.*, 703 F.2d at 65 n.4 (declining to consider the contours of the "unique circumstances" exception). *Cf. Merrell-National Laboratories, Inc. v. Zenith Laboratories, Inc.*, 579 F.2d 786, 790-1 (3d Cir. 1978) (refusing to apply "unique circumstances" doctrine despite alleged statements by the district judge's clerk where party did not face the loss of its right to appeal the final judgment and where party moved under a local rule instead of Rule 59). In *Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858 (3d Cir. 1970), the court dismissed an appeal for lack of jurisdiction because a Rule 59 motion had not been timely served. The 59(e) motion had been docketed before the time of appeal but the district court denied the motion as untimely, apparently after the thirty day period for filing a notice of appeal had expired. In dismissing the appeal for lack of jurisdiction, this court stated that the case was distinguishable from *Thompson*, "since there has been no reliance on any statement of the district court with respect to the timeliness of the motion." *Id.* at 860 n.5.

The one case in which this court has applied the "unique circumstances" exception is *Government of the Virgin Islands v. Gereau*, 603 F.2d 438 (3d Cir. 1979) (per curiam), a case construing Fed. R. Crim. P. R. 35. In *Gereau*, one defendant (ironically Meral Smith, the very same person who brings this appeal) filed a motion for reduction of sentence, pursuant to Fed. R. Crim. P. R. 35. The district judge stated he would consider the motion as filed on behalf of all defendants, but suggested that counsel file formal motions. Counsel then filed formal motions on behalf of all defendants: these motions were filed outside the 120 day time limit prescribed by Rule 35. This court, citing *Thompson*, held that it would be improper to penalize the defendants for counsel's failure to file the motions within the 120 day time limit when counsel relied on the court's statement that he would consider the motion as applying to all defendants and the court's invitation for counsel to file formal motions. *Id.* at 442. *Gereau* is distinguishable from the case at bar because of the district court's explicit statement that affirmatively misled Gereau.

We have some doubt as to whether the "unique circumstances" exception is still viable given the strict, jurisdictional construction recently applied to the 59(e) timeliness requirement. Recent Supreme Court decisions have strictly construed the rules of procedure and prescribed time limits. *But Cf. Houston v. Lack*, 56

U.S.L.W. 4728 (U.S. June 21, 1988) discussed *infra* at Part II(C). Most notably, in *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257 (1978), the Court held an appeal jurisdictionally defective because a Rule 59 motion was untimely and did not toll the time for filing a notice of appeal, even though the district court granted the Rule 59 motion.

The facts of *Browder*, necessary to an understanding of the holding, are as follows. The district court granted a conditional writ of habeas corpus on October 21, 1975. Twenty-eight days after entry of the order, the state moved for a stay of the release order and an evidentiary hearing. Though the state did not cite a particular rule as the basis for its motion, the Court construed it as a motion made pursuant to Rule 52(b) or Rule 59 (both motions must be made within ten days of entry of judgment). The district court granted the stay on December 8, and on December 12 set January 7, 1976, as the date for an evidentiary hearing. The district court's actions occurred past the thirty days allowed for filing a notice of appeal, but within the additional thirty days allowed for requesting an extension of time for filing a notice of appeal. An evidentiary hearing was held on January 7, 1976 and an order denying the motion for reconsideration was docketed on January 26. The state filed a notice of appeal within thirty days of the January 26 order.

Though the state's failure to file a timely notice of appeal and its failure to request an extension of time in which to appeal obviously reflected reliance on the district court's actions, the Supreme Court held that the appeal was untimely because the untimely motion for reconsideration did not toll the time for filing the notice of appeal. The Court emphatically stated that the thirty day time limit for filing an appeal prescribed by Rule 4(a), Fed. R. App. P., is "mandatory and jurisdictional." *Id.* at 264 (citations omitted). *See also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (court

of appeals had no jurisdiction because motion to reconsider was pending when notice of appeal was filed even though motion was decided four days later).

Much as the Supreme Court has tended to construe procedural rules and time requirements strictly, this court has narrowly construed and sparingly applied the "unique circumstances" exception to time requirements. *See also Long Island Radio Co. v. N.L.R.B.*, 841 F.2d 474, 478 (2d Cir. 1988); *Bailey v. Sharp*, 782 F.2d 1366, 1369-74 (7th Cir. 1986) (Easterbrook, J. concurring). At all events we find no basis for application of the "unique circumstances" exception in this case: we decline to apply the "unique circumstances" doctrine absent some express, affirmative statement by the district court that a motion is timely. No such statement can be found in this record.[3]

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[3] Even if we expanded our notion of "unique circumstances" to include reliance on the court's treatment of a motion as timely (without any affirmative statement as to timeliness one way or the other) we doubt, based on the available facts, that Smith received any communication from the district until *after* the thiry-day time for appeal had elapsed. That is, we question whether the district court's order granting Smith leave to prove damages (which was dated May 20) arrived at Lewisburg before Smith's time to appeal had elapsed (May 23). Furthermore, the court's order of May 20 did not technically grant Smith's 59(e) motion—only the court's July 23 order (finding damages of $1.00) actually granted Smith's motion for reconsideration. This demonstrates why even under an expansive view of the "unique circumstances" doctrine, it would probably not apply to Smith. The most likely way that such a broad theory of "unique circumstances" could apply would be if Smith relied upon the district court's order to prove damages and therefore did not apply for an extension of his time to appeal pursuant to Fed. R. App. P. 4(a)(5). We stress, however, that even if Smith had knowledge of the district court's willingness to entertain his Rule 59(e) motion, and even if that knowledge affected Smith's behavior regarding his appeal, because Smith received no affirmative statement as the timeliness of the motion, the "unique circumstances" doctrine cannot apply. Any other result would

C.

We note that very recently in *Houston v. Lack*, 56 U.S.L.W. 4728, 4730 (U.S. June 21, 1988), the Supreme Court, in a 5-4 decision, held that *pro se* prisoners notices of appeal are deemed "filed at the moment of delivery to prison authorities for forwarding to the district court." The Court so held in order to avoid the obvious unfairness caused by delays within the prison. The Court noted that

> lack of control of *pro se* prisoners over delays extends much further than that of the typical civil litigrant: *pro se* prisoners have no control over delay between the prison authorities' receipt of the notice and its filing, and their lack of freedom bars them from delivering the notice to the court clerk personally."

Id. See also Fallen v. United States, 378 U.S. 139 (1964) (defendant in a criminal case demonstrated that he did all that could reasonably be expected to file his motion for appeal within the 10-day limit and was unable to serve notice of appeal any sooner).

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negate the unwaivable nature of the time limitations for making Rule 59(e) motions.

We acknowledge that this bright line rule may prove harsh for *pro se* litigants who rely on district courts' willingness to entertain a motion as evidence of the motion's timeliness. Two factors, however, may ameliorate this problem. First, we emphasize that the district courts are without authority to act on untimely 59(e) motions. *See* Fed. R. Civ. P. 6. We note that district courts' actions upon untimely rule 59(e) motions are a chief source of confusion and unfairness in this highly technical, but critically important area of procedure. To the extent district courts can inform litigants expeditiously as to timeliness defects, such problems may be avoided. Second, the procedures suggested *infra* in Part II(D). whereby the district court clerk's office would send out notice of time requirements for certain rules affecting appeals, would serve to inform litigants of the disastrous effects of filing untimely motions.

Houston indicates that in the case of *pro se* prisoners, the Supreme Court is particularly solicitous of preserving the right to appeal where the impediment to timely filing concerns the process of transmitting mail from the prison over which the prisoner has no control. Although *Houston* concerned a late notice of appeal, its reasoning seems indistinguishable in the context of a Rule 59(e) motion, given the capacity of late Rule 59(e) motions to eviscerate appeals and the analogous rigid time limitations. Indeed, we note that in many respects treating a Rule 59(e) motion as served at the time it is delivered to the prison officials presents an easier case than the facts of *Houston*. First, the time limits for Rule 59(e) motions are shorter than those for notice of appeal and hence the potential for prison delay becomes more significant. Second, Rule 59(e) requires *service* which logically seems closer to delivery to the warden than the Fed. R. App. Pro. 4 *filing* requirement. If the Court was willing to deem an appeal filed by virtue of delivery to prison officials, it would seem *a fortiori* that such delivery should satisfy the service requirement of Rule 59(e) motions.

Unfortunately for Smith, the rule of *Houston* even when extended to Fed. R. Civ. P. 59(e) motions, does not render his motion timely, for we cannot conclude that prison delay in transmitting Smith's motion contributed to the lateness of the motion. On the face of Smith's Rule 59(e) motion Smith dated the submission as May 13, 1983. Indeed, that is the date this court used in computing the timeliness of Smith's motion. Therefore, to the extent that there was any delay in the prison's transmission of Smith's motion, that delay was not included in this court's calculation. It is clear that when Smith put his motion in the envelope (even before he gave it to prison authorities to mail) his motion was untimely.

D.

We are frankly uncomfortable with the harsh result in this case. We note three factors that mitigate the severity of our ruling. First, Smith offered no explanation for the lateness of the motion, which he clearly styled a Rule 59(e) motion and which was treated as such by the district court. Second, Smith managed to make his second motion for reconsideration in a timely fashion, indicating that for a similar motion made only weeks later Smith did not face insurmountable problems in mailing his motion within the proper time. Finally, although Smith was proceeding *pro se*, he is not a first-time litigant. He has filed three other appeals and one mandamus action since 1982.[4]

Notwithstanding our holding and the three factors discussed above, we acknowledge the potential harshness, especially in light of the possibility that mail may be quite slow between the Virgin Islands and Lewisburg, and word of the district court's final judgment on April 23 may have been delayed in reaching Smith. The Supreme Court's opinion in *Houston* may ameliorate some of the problems involving the treatment of mail within prisons. Moreover, it may be possible for the District Court of the Virgin Islands, through its rulemaking power, to take some steps that would address the problem of the time interval for mail between the mainland and the Virgin Islands. For example, that court may consider whether it is feasible and desirable to make some provision for the delayed entry of judgments of decisions that trigger brief and unwaivable time limitations, particularly in light of the federal rule providing that lack of or late notice of decisions has no effect. *See* Fed. R.

[4] We note that the issue presented in this complaint, lack of access to Virgin Islands law books, has been presented in at least two of these actions. We express no opinion as to whether the instant action would have been barred by the doctrine of res judicata.

Civ. P. 77(d). *See also Hall v. Community Mental Health Center of Beaver*, 772 F.2d 42 (3d Cir. 1985). Until the Advisory Committee on Appellate Rules reconsiders this area, it may be advisable for other district courts within this circuit to consider taking similar action.

Nonetheless, under the circumstances in this case and for the reasons set forth above, the appeal will be dismissed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

AMICUS CURIAE

BRIEF

Nos. 87-1939, 87-2008

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GEOFFREY W. BARNARD, AS CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,
Respondents.

VIRGIN ISLANDS BAR ASSOCIATION,
Petitioner,

v.

SUSAN ESPOSITO THORSTENN, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court of Appeals
For The Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF PAUL HOFFMAN AND BARBARA MIGNON WEATHERLY AS *AMICI CURIAE* URGING AFFIRMANCE

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September 1988

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

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MOTION FOR LEAVE TO FILE BRIEF OF PAUL HOFFMAN AND BARBARA MIGNON WEATHERLY AS *AMICI CURIAE* URGING AFFIRMANCE

Pursuant to Rule 36.3 of the Rules of this Court, Paul Hoffman and Barbara Mignon Weatherly respectfully move for leave to file the annexed brief as *amici curiae* urging affirmance.

Paul Hoffman moved to St. Thomas, United States Virgin Islands, in 1948, with his parents. He was less than two years old at the time. He was graduated from Harvard Law School in 1974, and has been admitted to the practice of law in the Virgin Islands (1974) and the

District of Columbia (1975). After serving as a law clerk and an Assistant United States Attorney in the District of Columbia, he returned home to the Virgin Islands in 1979. He is a member of the Virgin Islands Bar Association and practices law in St. Thomas as the sole shareholder, director, and officer of Paul Hoffman, P.C. Mr. Hoffman served as a member of the Board of Governors of the Virgin Islands Bar Association in 1983 and 1984.

Barbara Mignon Weatherly is an associate attorney in the law firm of Paul Hoffman, P.C. She was graduated from the University of South Carolina Law Center in 1974, and was subsequently admitted to the practice of law in South Carolina (1974), Delaware (1979), and the Virgin Islands (1988). Ms. Weatherly sat for the Virgin Islands Bar Examination in July 1987, and learned by letter dated December 22, 1987, that she had passed the examination. However, due to the operation of Rule 56(b)(4), she was not able to be sworn in as a member of the Virgin Islands Bar Association until August 5, 1988. Upon being admitted to the bar, she received a substantial raise from the salary she had been earning as a law clerk.

Amici, as residents of St. Thomas and practicing members of the Virgin Islands Bar Association, have a vital interest in the outcome of this case. *Amici* strongly feel that their professional interests as practicing attorneys will best be served if no unnecessary obstacles are placed in the path of qualified applicants seeking to practice law in the Virgin Islands. If qualified applicants face no excessive barriers to their relocation to the Virgin Islands or to their practice of law in the Virgin Islands while maintaining a residence on the mainland, the economic development of the Virgin Islands will be promoted. The restrictive residence rule which is being challenged in this case prevents otherwise-qualified applicants from becoming members of the Virgin Islands Bar Association, simply because they are not residents of the Islands or because, even if residents, they have moved to the Virgin Islands within the past year. By denying admission purely on the basis of residence, Rule 56(b)(4) excludes applicants who would be able and dedicated members of the Virgin Islands Bar Association, and it disserves the clients who may wish to be represented by them.

Each of the *amici* has been directly and substantially affected by the bar residence rule which is being challenged in this case. When Ms. Weatherly decided to relocate to the Virgin Islands, she could not become a member of the Virgin Islands Bar Association until after she moved to St. Thomas, and in fact her admission was delayed until a full year after her move. Mr. Hoffman, on the other hand, needed an associate to assist him in his practice, which consists principally of real estate matters. Although Ms. Weatherly had passed the July 1987 bar examination, her role in Mr. Hoffman's office was of necessity severely curtailed until she was admitted to the bar in the Virgin Islands. For example, she could not attend real estate closings as an attorney, requiring that Mr. Hoffman attend with her.

Counsel for petitioner Geoffrey W. Barnard declined to consent to the filing of the annexed brief. Mr. Colianni, counsel for petitioner Virgin Islands Bar Association, will be in Europe until after the date upon which the annexed brief is due to be filed, and counsel for *amici* was informed that in Mr. Colianni's absence no one else had the authority to consent to the filing of the brief. Counsel for the respondents has consented to the filing of the brief.

Mr. Hoffman and Ms. Weatherly respectfully request that they be permitted to file the annexed brief as *amici curiae*. As attorneys who practice law in St. Thomas as members of the Virgin Islands Bar Association, they will address the constitutionality of the residence requirement from a perspective markedly different from that which will be taken by any other party. *Amici* respectfully suggest that it will be useful for this Court to consider the views of Virgin Islands attorneys who oppose the existing residence requirement as overbroad, unnecessary, and harmful to the economic development of the Virgin Islands.

Respectfully submitted,

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September 1988

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BRIEF OF PAUL HOFFMAN AND BARBARA MIGNON WEATHERLY AS *AMICI CURIAE* URGING AFFIRMANCE

Interest Of The *Amici*

Paul Hoffman moved to St. Thomas, United States Virgin Islands, in 1948, with his parents. He was less than two years old at the time. He was graduated from Harvard Law School in 1974, and has been admitted to the practice of law in the Virgin Islands (1974) and the District of Columbia (1975). After serving as a law clerk and an Assistant United States Attorney in the District of Columbia, he returned home to the Virgin Islands in 1979. He is a member of the Virgin Islands Bar Association and practices law in St. Thomas as the

sole shareholder, director, and officer of Paul Hoffman, P.C. Mr. Hoffman served as a member of the Board of Governors of the Virgin Islands Bar Association in 1983 and 1984.

Barbara Mignon Weatherly was graduated from the University of South Carolina Law Center in 1974, and was subsequently admitted to the practice of law in South Carolina (1974), Delaware (1979), and the Virgin Islands (1988). Ms. Weatherly is now employed as an associate attorney in the law firm of Paul Hoffman, P.C. However, for the time between when she moved to St. Thomas in July of 1987 and the expiration of the one-year period of residence required by the rule at issue in this case, she was employed as a law clerk. Ms. Weatherly sat for the Virgin Islands Bar Examination in July 1987, and learned by letter dated December 22, 1987, that she had passed the examination. However, due to the operation of Rule 56(b)(4), she was not able to be sworn in as a member of the Virgin Islands Bar Association until August 5, 1988. Upon being admitted to the bar, she received a substantial raise from the salary she had been earning as a law clerk.

Amici, as residents of St. Thomas and practicing members of the Virgin Islands Bar Association, have a vital interest in the outcome of this case. *Amici* strongly feel that their professional interests as practicing attorneys will be advanced if no unnecessary obstacles are placed in the path of qualified applicants seeking to practice law in the Virgin Islands. If qualified applicants face no excessive barriers to their relocation to the Virgin Islands or to their practice of law in the Virgin Islands while maintaining a residence on the mainland, the economic development of the Virgin Islands will be promoted. The restrictive residence rule which is being challenged in this case prevents otherwise-qualified applicants from becoming members of the Virgin Islands Bar Association, simply because they are not residents of the Islands or because, even if residents, they have moved to the Virgin Islands within the past year. By denying admission to qualified applicants purely on the basis of their residence, Rule 56(b)(4), and the related requirement contained in Rule 56(b)(5), harm the applicants, the Virgin Islands attorneys who wish to employ the best-qualified attorneys in their firms, and the clients who would choose to be represented by the applicants following their admission to the bar.

Each of the *amici* has been directly and substantially affected by the bar residence rule which is being challenged in this case. When Ms. Weatherly decided to relocate to the Virgin Islands, she could not become a member of the Virgin Islands Bar Association until after she moved to St. Thomas, and in fact her admission was delayed until a full year after her move. Even though she passed the bar examination and was fully qualified to practice law, by operation of the restrictive residence rule she was forced to continue working as a law clerk until the waiting period was fulfilled. Mr. Hoffman, on the other hand, needed an associate to assist him in his practice, which consists principally of real estate matters. Although Ms. Weatherly had passed the July 1987 bar examination, her role in Mr. Hoffman's office was of necessity severely curtailed until she was admitted to the bar in the Virgin Islands. For example, she could not attend real estate closings as an attorney, requiring that Mr. Hoffman be present with her at the closings. These difficulties are typical of those which every Virgin Islands firm faces in attempting to hire attorneys from the mainland in order to fully serve the firm's clients. Any attorney who does not already live in the Virgin Islands will be discouraged from accepting legal employment in St. Thomas for the same reasons that Ms. Weatherly's relocation was so difficult: the residence requirement delays bar admission significantly, which restricts the tasks which the attorney may perform and forces her to accept the reduced responsibilities (and reduced salary) of a law clerk.

For the reasons that will be developed below, *amici* respectfully suggest that the residence requirement imposed by Rule 56(b)(4) and (b)(5) are unconstitutional, and that accordingly the judgment entered by the United States Court of Appeals for the Third Circuit should be affirmed.

Summary Of Argument

Under this Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), only an exceedingly strong justification could warrant the decision of the Virgin Islands to exclude all nonresidents from the practice of law. Under *Piper*, a substantial

reason must be shown for discriminating against nonresidents, and the discrimination must bear a substantial relationship to the State's objective. The rules at issue here, which totally exclude all nonresidents from the Virgin Islands Bar Association, and which even go so far as to exclude applicants who have been residents for less than a year, come nowhere close to meeting the *Piper* test.

The district court upheld the residence requirement, and petitioners defend it, principally on the basis of the allegedly inferior services available to those who live and work in the Virgin Islands. Travel to and from the mainland, long distance telephone service, and mail delivery are all described as inferior, and it is said that no nonresident could even determine the law of the Virgin Islands, since publication of recent decisions may be delayed. As will be discussed below, these allegations do not accurately describe the way that law is practiced in the Virgin Islands today. Attorneys practicing in the Islands, like their counterparts across the country, do sometimes encounter inconveniences in representing their clients. However, there are no circumstances unique to the Virgin Islands which would prevent a conscientious member of the Virgin Islands bar from providing excellent representation to that attorney's clients, whether or not the attorney is a resident.

Even if the petitioners could demonstrate a substantial reason for discriminating against nonresidents, which they have not done, the residence requirement would fall because it bears no close or substantial relationship to any proper purpose. Any legitimate end which might be served by the residence requirement could be accomplished by means which are much less restrictive, such as by requiring nonresident attorneys to associate local counsel in cases in which emergency hearings might be expected to occur. In *Piper*, this Court undertook a very practical analysis of the alternatives which are available to serve the ends ostensibly promoted by residence requirements, and under the analysis called for by *Piper* it is plain that the Virgin Islands cannot justify the total exclusion of all nonresidents from its bar.

Petitioners allege that nonresidents cannot be admitted to the Virgin

Islands bar because they would not carry their fair share of the burden of representing indigent criminal defendants. This concern is premature, since there is no basis for concluding that nonresidents, once admitted, would fail to accept their share of court appointments in criminal cases. To the extent that certain aspects of the existing system of making such appointments would make it inconvenient for nonresidents to discharge their responsibilities, the district court should adopt the less restrictive alternatives which are at its disposal, rather than excluding all nonresidents and thereby assuring that the resident members of the Virgin Islands bar will continue to carry the full burden.

Ultimately, the residence requirement at issue in this case is unsupported by any justification which comes close to meeting the test laid down by *Piper*. Although the requirement may be based on an unarticulated desire to insulate attorneys in the Virgin Islands from competitive forces, any such purpose would be both unconstitutional and contrary to the long-run economic interests of the Virgin Islands. Just as the economic health of our Nation depends on the absence of internal trade barriers, so does the economic health of the Virgin Islands depend on integration into the economy of the mainland. Qualified applicants should be admitted to the bar of the Virgin Islands without regard to their residence, just as qualified nonresidents are now admitted to the bar of every State.

ARGUMENT

I. THE RESIDENCE REQUIREMENT IMPOSED BY RULE 56(b) IS UNCONSTITUTIONAL BECAUSE THERE IS NO SUBSTANTIAL REASON FOR THE DIFFERENCE IN TREATMENT IMPOSED ON OTHERWISE-QUALIFIED NONRESIDENTS.

This Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), clearly delineates the standard which must be applied in determining whether the residence requirement imposed on those seeking to practice law in the Virgin Islands can withstand

scrutiny under the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. In *Piper*, this Court held that "the right to practice law is protected by the Privileges and Immunities Clause." 470 U.S. at 283. However, the Privileges and Immunities Clause, which is applicable to the Virgin Islands by virtue of 48 U.S.C. § 1561 (the Revised Organic Act), is not absolute:

> The Clause does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.

Piper, 470 U.S. at 284. Although the Court of Appeals did not address the Privileges and Immunities Clause issue raised in this case because it determined that Rules 56(b)(4) and (b)(5) should be invalidated by the exercise of the court's supervisory power, Appendix to Petition for Certiorari in No. 87-1939 (hereinafter cited as "Pet. App.") at 7a-9a, *amici* respectfully urge that the most direct path to resolution of this controversy is provided by the Privileges and Immunities Clause. Reliance on the seldom-discussed supervisory power in *Frazier v. Heebe*, 107 S. Ct. 2607 (1987), was perhaps attributable to the fact that by its terms the Privileges and Immunities Clause of Article IV binds the states, not the federal government. Here, the Privileges and Immunities Clause is fully applicable by statute, making it unnecessary for this Court to go beyond the clear principles articulated in *Piper*.

Petitioners defend Rules 56(b)(4) and (b)(5) against respondents' Privileges and Immunities Clause attack at pages 30- 37 of their joint brief. The essence of their argument is that while a residence requirement is unconstitutional if imposed on the mainland, "the territory's geographic isolation and the attendant difficulties in transportation and communication justify the residency requirements." Pet. Br. at 31. In addition, petitioners allege, and the district court found, that nonresidents "simply lacked practical access to current Virgin Islands law," Pet. Br. at 33, and that the Islands' system of mandatory appointments to represent indigent criminal defendants "would be absolutely unworkable with nonresidents." Pet. Br. at 34. None of these purported justifications for the residence requirement comes close to meeting the stringent standard laid down by *Piper*, and in fact each of these arguments is a first cousin of those already rejected by this Court.

Before attempting to apply the teachings of *Piper* to the particular circumstances of the Virgin Islands, it is useful to recall how broad Rule 56(b) is. The rule provides:

> (b) Each applicant for examination under the preceding section must file an application with the Committee of Bar Examiners at least 30 days prior to the date prescribed for annual examination as above, in which he must allege and prove to the satisfaction of the committee that:
>
> . . .
>
> 4. He shall have resided in the Virgin Islands for at least one year immediately preceding his proposed admission to the Virgin Islands Bar; and
>
> 5. If admitted to practice, he intends to continue to reside in and to practice law in the Virgin Islands;
>
> . . .

Attorneys, once admitted to practice in the Virgin Islands, "who cease to be domiciled in the Virgin Islands, shall cease to be active members" of the Virgin Islands Bar Association. V.I. Code, Title 5, App. V, Rule 51 (By-Laws of the Virgin Islands Bar Association Integrated), at I.5, I.6. *See* Jt. App. at 40. Thus, the earliest that one seeking admission to practice in the Virgin Islands can actually qualify as an attorney is a full year after declaring an intention to "reside in and to practice law in the Virgin Islands" and taking the bar examination. As Ms. Weatherly's experience demonstrates, bar examination results are released approximately five months after the July examination, yet admission cannot take place until the applicant has resided in the Virgin Islands for a year. If, after passing the bar examination, completing a year's residence, and being sworn in as a bar member, an

attorney ceases to maintain her domicile in the Virgin Islands, she ceases to be an active member of the Virgin Islands Bar Association and loses the right to appear in the district court and the territorial court.

The district court held that the one-year durational residence requirement "is the least restrictive means of preventing the harm which would be caused by the admission of nonresident attorneys to the bar." Pet. App. at 67a. The court explained that many of those who move to the Virgin Islands find life there unpleasant and soon return to the mainland, making the one-year residence requirement "the best circumstantial guarantee of an applicant's resolution to remain in the territory." *Id.* The court did not identify any harms which would result if some of those admitted to the Virgin Islands bar after passing the bar examination later left the Islands. In any event, petitioners say nary a word in defense of the durational aspect of the residence requirement.

At the outset, it should be noted that the residence requirement at issue in this case imposes a much greater burden on nonresidents than did the requirement invalidated in *Piper*. All that New Hampshire required was residence at the time of admission to the bar. Thus, an applicant like Ms. Weatherly who was relocating from one state to another could, upon passing the bar examination, move to New Hampshire and immediately begin practicing her profession. Moreover, an attorney who was admitted to the New Hampshire bar and later decided to move to another state was not stripped of active membership in the New Hampshire bar. As described above, the burdens imposed on nonresidents solely because of their nonresidence is much more severe in this case.

While the burden imposed on nonresidents is much greater here, petitioners have been no more successful than was New Hampshire in demonstrating that "there is a substantial reason for the difference in treatment." *Piper*, 470 U.S. at 284. Much of the burden of sustaining the residence requirement has fallen on anecdotal horror stories about how difficult it is to live and practice law in the Virgin Islands. According to the district court, air travel on short notice "remains

difficult, if not impossible," telephone service is "erratic" and connections with the mainland are frequently unavailable, and the services which provide for the transport of materials and documents to and from the mainland are "undependable." Pet. App. at 65a.

Amici, who practice law in St. Thomas, and particularly Mr. Hoffman, who has lived in St. Thomas almost his entire life and who has practiced law there for nearly ten years, respectfully disagree with the contention that travel, telephone connections, and mail and express service between the Virgin Islands and the mainland are so deficient that they would prevent a conscientious nonresident attorney from living up to the attorney's professional responsibilities. But, more important than opinions about how good or bad such services are in the Virgin Islands, is the fact that such services — good or bad — have almost nothing to do with the residence requirement at issue here.

First of all, the district court and the petitioners completely ignore the fact that no client will ever be required to retain a nonresident attorney, even if Rules 56(b)(4) and (b)(5) are stricken. To the extent that it might be difficult and expensive for a nonresident attorney to travel to the Virgin Islands, a client might well decide to utilize the services of a resident attorney, either exclusively or in conjunction with a nonresident. On the other hand, a client "may have a number of excellent reasons to select a nonlocal lawyer: his or her regular lawyer most familiar with the legal issues may be nonlocal; a nonresident lawyer may practice a specialty not available locally; or a client may be involved in an unpopular cause with which local lawyers are reluctant to be associated." *Frazier v. Heebe, supra*, 107 S. Ct. at 2614 n.12. These considerations apply with special force in the Virgin Islands, where specialists in such fields as taxation, complex domestic matters, and medical or legal malpractice are in short supply. Moreover, in the "small world" of the Virgin Islands it may be especially difficult for a would-be client to find a local attorney willing to sue the Government of the Virgin Islands or another powerful local interest or individual.

Second, any concern about the alleged difficulty of travel between the Islands and the mainland applies mainly to litigation, in which

court hearings may be set on short notice. However, in the Virgin Islands, as in the rest of the United States, most attorneys do not devote themselves principally to litigation, and many (like *amici*) do almost no litigation. Thus, if any residence requirement could be justified on the basis of concerns about travel, it would have to be one limited to the circumstances in which the alleged evil could be expected to manifest itself — litigation.

Third, it is obvious that fears about the inadequacy of travel, telephone service, and mail delivery have no pertinence at all to a large segment of those who are disadvantaged by Rule 56(b)(4), those who actually live in the Virgin Islands but have not yet lived there for a year. To the extent that the alleged deficiencies affect new arrivals, the new residents face no barriers to legal practice beyond the allegedly enormous ones under which all *resident* attorneys in the Islands are said to labor.

Fourth, it is apparent that neither the district court nor the petitioners recognize the significance of the *Piper* Court's insistence that developing technologies must be explored before it is concluded that all nonresidents will be barred from the practice of law due to the alleged inconveniences which they might suffer. For example, the *Piper* Court noted that telephone conference calls "are being increasingly used as an expeditious means of dispatching pretrial matters," thus reducing the need for a nonresident attorney to travel long distances. 470 U.S. at 286 n.21. A related revolution in technology, which has for the most part occurred after this Court decided *Piper* in 1985, is the increasing use of facsimile machines to transmit documents over the telephone lines. Facsimile machines are now common in law offices in the Virgin Islands and on the mainland, rendering distance practically irrelevant so far as the transfer of documents is concerned. In addition, the Virgin Islands is now served by Express Mail, Federal Express, and similar services offering delivery service which is much faster than the regular mails.

A number of the other arguments advanced by the petitioners fall quickly if scrutinized under the highly practical approach taken in *Piper*. For example, it is strenuously contended that only attorneys

who live in the Virgin Islands have any way of keeping up with legal developments. Even assuming that it is somewhat less convenient to research the law of the Virgin Islands than that of New York or California (perhaps a questionable assumption given the much larger quantities of material to be mastered in those states), it is by no means impossible or even difficult. The Virgin Islands Bar Association recently assumed the responsibility of distributing "all Territorial and District Court opinions" for the modest fee of $25.00 per year. Jt. App. at 49-50. Not only could a nonresident attorney subscribe to this service, but up-to-the-minute information on court decisions is available to anyone who takes the trouble to take out a mail subscription to a daily newspaper in the Islands. While the computerized legal research services do not yet include Virgin Islands materials in their data bases, coverage for the services has expanded greatly in recent years and may well soon embrace the relatively few volumes which comprise the decisional law of the Virgin Islands. In any event, to the extent that the tardy publication of Virgin Islands opinions constitutes a serious problem, it is a lamentable condition which should be corrected by the Government of the Virgin Islands. It would regrettable if such a circumstance, which is within the control of the proponents of the residence rule, could form any part of the justification for a residence requirement which would otherwise be declared invalid.

Perhaps the major effort made by the petitioners to come up with a "substantial reason" for the total ban on bar membership for nonresidents is the assertion that allowing nonresidents to be admitted to the bar would disrupt the implementation of the Plan of the District Court of the Virgin Islands promulgated to implement the Criminal Justice Act of 1964. The plan constitutes Rule 16 of the district court's rules. In brief, all attorneys who are actively practicing law in the Virgin Islands must accept appointments, made principally on a rotational basis, to represent indigent criminal defendants. An attorney who receives such an appointment must "communicate with the defendant at his place of incarceration as promptly as possible, and not later than five days from the date of the clerk's mailing of the order of appointment." Pet. App. at 76a. Petitioners contend that nonresident counsel could not fulfill their obligations under Rule 16

in a timely fashion, especially in light of the alleged difficulty of traveling to the Virgin Islands from the mainland. Petitioners assert that "[w]ithout a doubt, such nonresidents would seek exemption from this responsibility which is borne by all resident members of the bar." Pet. Br. at 15. *See also* Pet. Br. at 16 ("it cannot be seriously contended that a system in which nonresidents are given preference and advantage over residents in the practice of law would constitute a rule consistent with 'the principles of right and justice.'").

Once again, petitioners' argument is both highly speculative and fundamentally inconsistent with the thrust of *Piper*. As with so many other aspects of petitioners' defense of the residence requirement, the proffered justification is flatly contradicted by the durational aspect of the rule. To the extent that the one-year residence requirement delays the admission to practice of applicants like Ms. Weatherly by approximately half a year, the number of attorneys available to share the burden of representing indigents is reduced. As to applicants who have not established residence in the Virgin Islands, it is plain that under the existing rule they will not (and cannot, because of the prohibition on the unauthorized practice of law) provide any representation to indigents in the Virgin Islands. Thus, the immediate and undeniable effect of the rule purportedly designed to assist in obtaining representation for indigents is to reduce the pool of attorneys available to provide such representation.

The essence of petitioners' complaint is that nonresident attorneys would not assume their fair share of the burden of representing indigents. Of course, at this point petitioners' fears are entirely premature, since no nonresidents have yet been admitted to the bar. *Piper*, in addressing a related argument made by New Hampshire in that case, expressed the view that it is reasonable to believe "that most lawyers who become members of a state bar will endeavor to perform their share" of pro bono and volunteer work. 470 U.S. at 287. Not only is a bar examination required of all those seeking admission to the Virgin Islands bar, *see Supreme Court of Virginia v. Friedman*, 108 S. Ct. 2260, 2266 (1988) (a bar examination "is not a casual or lighthearted exercise"), but annual bar dues and licensing fees stand as a deterrent to any who might contemplate seeking admission without

intending to pursue a substantial practice in the Islands. Having invested substantial time and effort in becoming members of the Virgin Islands bar, nonresidents are likely to carry out whatever appointments are required by the courts of the Virgin Islands as a condition of retaining a license to practice.

Respondents' challenge to some aspects of Rule 16 was not addressed by the court of appeals. Pet. App. at 8a n.4. Nor is there any reason for this Court to decide now whether nonresidents admitted to the Virgin Islands bar could properly be required to conform to every aspect of the existing appointment system as described by the district court. For present purposes, it is sufficient to note that Rule 16, if rigidly enforced in every detail, would pose difficulties for many resident attorneys comparable to those which it is feared would be experienced by nonresidents. For example, many attorneys who live and practice law in the Virgin Islands spend a substantial portion of their time "off island" due to business or personal travel. There is no justification for the appointment system to be less flexible when a nonresident attorney is involved than when a resident attorney is "off island", whether on vacation in Europe or taking a series of depositions in New York, when the appointment is made.

For the reasons discussed above, *amici* respectfully suggest that petitioners' bald assertions about why nonresidents cannot be allowed to practice law in the Virgin Islands under any circumstances are illogical, contrary to this Court's decisions in *Piper* and *Frazier*, and not an accurate description of how law is practiced in the Virgin Islands in 1988. No "substantial reason" has been shown for totally excluding qualified nonresidents from the bar of the Virgin Islands.

II. IF ANY DISCRIMINATION AGAINST NONRESIDENTS CAN BE JUSTIFIED, MEANS WHICH ARE SUBSTANTIALLY LESS RESTRICTIVE THAN RULE 56(b) ARE READILY AVAILABLE.

Even if petitioners could somehow prove that there is a substantial reason for discriminating against all nonresidents with respect to bar

admissions, they would still face the second prong of the *Piper* test, which asks whether "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." 470 U.S. at 284. "In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means." *Id.*

Once again, *Piper* itself refutes most of the arguments raised by petitioners. For example, even if petitioners' expressed concerns about poor airline, telephone and mail service were shown to have some basis, there would be no justification whatsoever for responding as petitioners have, by denying all nonresidents the opportunity to practice law in the Virgin Islands. Rather, the appropriate and least restrictive means of assuring the timely attendance of attorneys would be to impose a "local counsel" requirement in some or all cases. That is precisely the course suggested by the *Piper* Court, which observed that a "trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings." 470 U.S. at 287. Without in any way distinguishing *Piper*, petitioners would prefer to ignore its holding and simply exclude all nonresidents from the practice of law, whether or not they have associated with local counsel, whether or not the lawsuits are ones in which unscheduled meetings and hearings are likely to occur, and whether or not the nonresident attorneys have been retained to participate in litigation at all, as opposed to providing advice or assisting in a business transaction.

Petitioners' argument based on indigent criminal appointments fares no better under *Piper*'s "less restrictive means" analysis. Even assuming that the need for appointments is as great as petitioners contend, there is no reason that procedures cannot be implemented, short of completely excluding all nonresidents from practice, which would assure that nonresidents carry their fair share of the burden of providing representation for indigents. Without undertaking a comprehensive reworking of Rule 16, *amici* respectfully offer below several suggestions on how an appointment system incorporating service by nonresident attorneys could promote efforts to provide indigents with

competent representation, rather than frustrating such efforts as the petitioners contend would occur.

One simple modification which would greatly reduce the burden on residents and nonresidents alike would be elimination of the practice, which has been enforced in the district court (although not actually written into Rule 16), that "none but the appointed attorney may appear on behalf of the criminal defendant." Pet. App. at 66a. This requirement, while no doubt well-intentioned, has the effect in many instances of denying indigent defendants the most effective representation which is available. For instance, if a specialist in banking law who practices in a firm with an attorney who acquired extensive criminal experience as a public defender is appointed to represent an indigent in a criminal case pending in district court, the attorney is forbidden to turn the matter over to his much-better-qualified partner, even though such a substitution would be favored by both attorneys and by the client. Thus, the same "no substitutions" practice which would impose inconvenience on nonresident attorneys already fails in its goal of providing indigents with the best available defense while placing on bar members a burden which is no greater than necessary.

Respondent De Vos is a partner in a law firm which has a resident managing partner and two resident associates in the Virgin Islands, along with one attorney who is "of counsel" to the firm. Jt. App. at 32. If, as petitioners fear, Mr. De Vos found himself unable to personally handle a criminal defense appointment made by the district court, no unfair burden would be imposed on other members of the Virgin Islands bar if another attorney in Mr. De Vos' firm were permitted to handle the case. The only proper concern of the district court and of petitioners is that nonresidents admitted to the Virgin Islands bar accept their fair share of court appointments. There are a multitude of ways in which that goal can be accomplished, especially since there is absolutely no evidence in the record to suggest that respondents or any other nonresidents would attempt to shirk their responsibilities. It is entirely proper to expect nonresidents to assume a fair share of the burden of representing indigents; it is entirely inconsistent with the "less restrictive means" approach of *Piper* to permit the Virgin Islands courts to adopt rules governing such appointments which are unnec-

essarily inflexible, as the "no substitutions" practice is. Another readily-identifiable modification which would improve the criminal defense provided indigents while assuring that nonresident attorneys contibute their fair share would be increased reliance on voluntary representation by the members of the Virgin Islands bar of those indigents who are not represented by the public defender. To the knowledge of *amici*, there is at present no program operated by the court through which attorneys willing to accept criminal defense appointments are encouraged to make their identities known to the court. To the extent that the rates of compensation provided for by the Criminal Justice Act are found to be too low to bring forward enough volunteers, the compensation could be supplemented by an IOLTA ("interest on lawyers' trust accounts") plan of the sort used in many other jurisdictions. In fact, while a member of the board of governors of the Virgin Islands Bar Association, *amicus* Hoffman vigorously supported establishment of an IOLTA program. Such a program would raise substantial funds due to the way in which real estate transactions are structured in the Virgin Islands, using attorney trust accounts rather than escrow companies to hold the funds which are to be transferred.

There can be no question about the fact that, if the district court and petitioners were at all open to the possibility of admitting nonresidents to the bar of the Virgin Islands, adequate procedures could be devised to protect the interests of the public and the court system. *Piper*, by applying a "less restrictive means" test, requires that such procedures be utilized instead of simply banning all nonresidents from the practice of law. The intriguing question which remains is why, with less restrictive alternatives so readily available, they have not been adopted.

A number of courts and commentators have recognized the risk that restrictive bar admission rules may be used to protect the perceived economic interests of the bar rather than the interests of the public. Thus, even the two judges on the United States Court of Appeals for the First Circuit who would have upheld New Hampshire's residence requirement in *Piper* admitted that it might well have an anticompetitive purpose:

> We recognize at the outset that New Hampshire's rule may serve the less than commendable purpose of insulating New Hampshire's practitioners from out-of-state competition. It may discourage those with New Hampshire legal problems from choosing lawyers residing outside New Hampshire to represent them for two reasons. First, a nonresident lawyer who is fully familiar with New Hampshire law cannot explain this latter fact to the client by pointing to bar membership. Second, the nonresident lawyer may have to pay a fee to a New Hampshire bar member to associate the bar member with the case, should a court appearance prove necessary. ,

Piper v. Supreme Court of New Hampshire, 723 F.2d 110, 119 (1st Cir. 1983) (en banc) (Opinion of Campbell and Breyer, JJ.). *See id.* at 116 n.6 (Opinion of Bownes and Coffin, JJ.). Former American Bar Association President Chesterfield Smith has stated that "[m]any of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." *Time for a National Practice of Law Act*, 64 A.B.A.J. 557 (1978). *See also* Horack, *"Trade Barriers" to Bar Admissions*, 28 J. Am. Judic. Soc. 102 (1944) ("an examination of requirements for admission to the bar shows a distinct leaning toward the protection of the local student and the local lawyer with much the same effect as is created by ordinary trade barriers"). As this Court observed in *Piper*, the "Privileges and Immunities Clause was designed primarily to prevent such economic protectionism." 470 U.S. at 285 n.18.

Whatever the degree to which bar residence requirements in general have reflected economic protectionism, *amici* respectfully suggest that the geographic isolation and small size of the Virgin Islands may to some degree increase the temptation to bar admission authorities to utilize residence requirements to discourage or even prevent otherwise–qualified applicants from being admitted to the practice of law. There are a number of other statutes in the Virgin Islands which are distinctly out of line with the residence requirements imposed in most states, and taken together these statutes indicate a clear practice on the part of the Virgin Islands to insulate from change the economic and social structure of the Virgin Islands.

For example, the Legislature of the Virgin Islands recently passed a statute increasing the residence requirement for voters from 30 days prior to an election to 90 days. Act No. 5352 (approved July 15, 1988; effective for the general election in November 1990). *But see Dunn v. Blumstein*, 405 U.S. 330, 348 (1972). Loans from the Virgin Islands Small Business Development Agency are limited to those who (1) were born in the Virgin Islands, (2) have one parent who was born in the Virgin Islands, and also have themselves been residents for five years, or (3) have been residents of the Virgin Islands for ten years. 11 V.I.C. §§ 1252(a)(3), 1252(d). *See also* 29 V.I.C. § 576 (75% of the concessions granted by the Virgin Islands Port Authority must go to persons who meet the criteria set forth in 11 V.I.C. § 1252). Durational residence requirements of at least one year are also imposed on those seeking to qualify for a wide range of occupations, including podiatrists (27 V.I.C. § 168f(b), twelve months); electricians and plumbers (27 V.I.C. § 265(a)(1), twelve months); architects, engineers, and land surveyors (27 V.I.C. § 283(2), one year); and operators of automobiles for hire (20 V.I.C. § 401(a)(3), one year).

Not only does the residence requirement at issue in this case appear to reflect an improper effort to protect Virgin Islands attorneys from the perceived economic threat posed by attorneys from the mainland, but the protectionism is almost certainly contrary to the long-term economic development program being undertaken by the Virgin Islands. Just as the drafting and adoption of our Constitution was based on "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation," *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979), so will the future health of the economy of the Virgin Islands depend on the elimination of trade barriers.

Because of the necessity to reduce the traditional dependence on tourism, the Islands have attempted to attract a variety of other businesses and commercial activities. One can only hope that the inaccurate descriptions of life and work in the Virgin Islands offered by the district court in its opinion and by the petitioners in their brief never fall into the hands of a corporation which is considering relocating to the Islands or opening a facility there. While it may be tempting for the Virgin Islands to seek a refuge from what it sees as unwanted competitive pressures from the mainland, it is the Virgin Islands which will be the loser if this Court accepts the assertion that life in the Islands is inferior to that on the mainland. If a wall of economic protectionism, so foreign to the principles on which our Constitution is based, is permitted to be erected around the Virgin Islands, the residents of the Islands will be the victims, not beneficiaries, of the economic isolation which will follow.

The economic environment in the Virgin Islands will be a more attractive one if there are no unreasonable barriers preventing qualified applicants from joining the Virgin Islands bar and thereafter being available to serve the clients who may wish to retain them. *See In re Sackman*, 90 N.J. 521, 530, 448 A.2d 1014, 1019 (1982). Nor can the long-run interests of the Virgin Islands be well served by the acceptance of residence requirements which are based on the erroneous assumptions that the publication of local decisions will always be tardy, that air service will always be limited, and that mail and telephone service will always be substandard. The Virgin Islands are truly part of the United States, and it is appropriate for this Court to subject the rules governing admission to the bar of the Virgin Islands to the same scrutiny applied to bar admission requirements adopted in other jurisdictions. Under that standard, the residence requirement at issue in this case cannot stand.

Conclusion

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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